RNI No. MAHBIL /2009/31744
Reg. No. MH/MR/South-318/2013-15

महाराष्ट्र शासन राजपत्र

भाग एक–ल

वर्ष ६, अंक ३१] गुरुवार ते बुधवार, ऑक्टोबर १६-२२, २०१४/आश्विन २४-३०, शके १९३६ [पृष्ठे ४४, किंमत : रुपये २३.००

प्राधिकृत प्रकाशन

(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील (भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त) अधिसूचना, आदेश व निवाडे.

BEFORE THE JUDGE, EMPLOYEES STATE INSURANCE COURT AT KOLHAPUR

APPLICATION (ESI) No. 7 OF 1992.—Ichalkaranji Metalloy, Founders Pvt. Ltd., Plot No. 4 & 5, Ganganagar, Ichalkaranji, Dist. Kolhapur.—*Applicant*—*Versus*—The Director, Employees State Insurance Corporation, PMT Commercial Complex, Shankarsheth Road, Swargate, Pune.—*Opponent / Respondent*.

In the matter of Application under section 75 and 77 of the Employees' State Insurance Act, 1948.

CORAM.—Shri C. A. Jadhav, Judge

Appearances.—Shri D. S. Joshi, Advocate for the Applicant.

Shri S. V. Kotnis, Advocate for the Respondent.

Judgment

1. This is an application under section 77 read with section 75 of the Employees' State Insurance Act seeking declaration that order passed by Dy. Director of the Respondent Corporation claiming contribution on "omitted wages" is bad in law and to quash and set aside the same.

2. Admittedly, the Applicant is a private limited company registered under the Companies Act, and is covered under the E.S.I. Act. Corporation's Insurance Inspector inspected Applicant's record on 28th January 1990. The Deputy Director, then served notice dated 11th April 1990, upon the Applicant to pay contribution. The Applicant then gave reply dated 21st June 1990 and paid Rs. 4,125 as contribution on certain amounts which were wages. But, the Deputy Director then issued notice dated 30th September 1991, in Form No. C-18, calling upon the Applicant to pay contribution of Rs. 11,561 on difference of wages and granted personal hearing. The Deputy Director then passed impugned order under section 45A of the E.S.I. Act on 22nd January 1992, directing the Applicant to pay requisite contribution along with interest. Said order is challenged in this application.

3. It is case of the Applicant that it engaged a contractor for rendering security services, made payments to the contractor and paid the contribution on the amount of wages paid by the contractor to his employees. However, the Corporation is claiming contribution on the amount of difference which includes profit, administrative charges and overheads of the contractor. The difference of amount retained by the contractor does not fall within definition of "wages" as defined under section 2(*22*) of the E.S.I. Act and no contribution can be claimed on such amount. Besides, notice dated 30th September 1991 was received by the Applicant on 15th October 1991 and hence nobody could attend the personal hearing on 16th October 1991. A written representation was made on 21st October 1991 to show as to how the contribution is not payable on the difference of amount. But, the same is neither considered nor taken on record. As such, order demanding contribution of Rs. 11,561 is bad in law. Finally, the Applicant has prayed for requisite relief.

4. The Respondent-Corporation filed its say at Exh. 8 and the written statement at Exh. 7, contending, at the outset that the Applicant has not deposited 50% of amount of the amounts claimed and therefore, the application is liable to be dismissed on this account itself.

5. It is then contended that the Applicant did not avail the opportunity of personal hearing and is now estopped from raising any please in subsequent judicial proceedings. There was huge difference in the amounts paid to the contractor as compared to the amounts considered for paying contribution. As such, the Applicant ought to have produced requisite particulars when opportunity of personal hearing was given to him. It is then explained that the Director would have considered the documentary evidence and then would have passed a revised order. Finally, the Respondent justified its action and prayed for dismissal of the application.

6. I heard both Advocates. Considering rival submissions, following points arise for my determination :—

(*i*) Whether a fresh and denovo hearing is necessary to decide the controversy on merits ?

(*ii*) What order ?

7. My findings, on above points, are as under :—

(*i*) Yes.

(*ii*) The Application is partly allowed.

Reasons

8. Both parties have produced concerned documents and records. No oral evidence is adduced, by any of them.

9. The Applicant has raised multifold contentions in application while challenging order of paying contribution on the difference of amounts paid to the contractor. Its main grievance is that no sufficient opportunity of being heard was extended. The Respondent has also contended that a revised order could have been passed if requisite documents would have been produced before him. The controversy as to whether profits and expenses of the contractor is covered by the "wages" goes to the root of the matter. In my judgment, it will be in the interest of both parties to have a fresh - denovo hearing. The Applicant will not be prejudiced if his case is reconsidered by the Corporation. Nor the Corporation will be prejudiced if directed to decide the controversy after a fresh hearing.

10. Shri Kotnis, learned Advocate representing the corporation argued that the Applicant be directed to deposit the disputed amount to show his *bonafides.* However, in my judgment, such directions are unwarranted. The Applicant is covered by the ESI Act and has paid the contribution of wages paid by the contractor to his employees. Advocate Shri. Kotnis further argued that impugned order be kept in abeyance while directing a fresh hearing. I am not impressed by his arguments, as fresh hearing will result into fresh orders.

11. In the background of above discussions, I hold that a fresh-denovo hearing is necessary for effectively applying principles of natural justice. Accordingly, I answer Point No. 1 in the affirmative and pass following order :—

Order

(*i*) The Application is partly allowed.

(*ii*) Impugned order dated 22nd January, 1992, directing the Applicant to pay contribution of Rs. 11,561 is set aside.

(*iii*) The Applicant is directed to produce all relevant papers and documents before the Corporation.

(*iv*) The Corporation is directed to determine or reassess or recalculate the contribution, if any, after giving an opportunity to the Applicant in accordance with the provisions of the ESI Act, within a period of six months from today.

(*v*) On failure of the Applicant, the corporation shall not be bound to give opportunity to the Applicant.

(*vi*) The parties shall bear their own costs.

C. A. JADHAV,
Judge,
Employees' State Insurance Court, Kolhapur.

Kolhapur,
Dated the 19th November 2003.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

COMPLAINT (ULP) No. 82 OF 1992.—Shri Dattaram Waman Swar, Junior Assistant, Sindhudurg, 139, G, Ubha Bazar, Sawantwadi, District Sindhudurg.—*Complainant—Versus*—Divisional Controller, Maharashtra State Road Transport Corporation, Sindhudurg Division, Kankavali, District Sindhudurg.—*Respondent.*

In the matter of complaint under section 28(*1*) read with item 9 of Sch. IV of the MRTU & PULP Act, 1971.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri G. P. Pansare, Advocate for the Complainant.

Shri M. G. Badadare, Advocate for the Respondent.

Judgment

1. This is a complaint under section 28(1) read with Item 9 of Sch. IV of the MRTU & PULP Act.

2. Admittedly, the Complainant started working under the Respondent-Maharashtra State Road Transport Corporation as a clerk from April, 1971. He was made permanent on same post with effect from 1st November 1973. He was then temporarily promoted on the post of Junior-Assistant from 1st July 1981. He then passed requisite Departmental examination and was regularly promoted on the post of Junior Assistant with effect from 1st October 1985. It is also an admitted position that he was given regular increment and his pay was fixed at Rs. 1,920 with effect from 1st April 1991 as per order of the Respondent-Divisional Controller bearing No. 532/91 dated 5/14th September 1991. The Respondent then refixed his basic pay at Rs. 1,560 by office order No. 118/92, dated 15th February 1992. It is case of the Complainant that his past record is clean and unblamished and he has passed requisite departmental examination for the post of Junior Assistant. No opportunity of being heard was extended to him while reducing his pay from Rs. 1,920 to Rs. 1,560. It is further contended that he has not committed any misconduct and no enquiry took place while reducing his pay. It is further alleged that pay of other employees working on same post is not reduced like of him. On the contrary, he is deprived of the benefits as per Corporation's circular dated 23rd May 1981 and he will receive less wages at Rs. 800 per month. It is then alleged that Respondent's such action is vindictive and colourable exercise of powers. He has recorded a protest to order dated 15th February 1992 by his letter dated 24th February 1992. According to the Complainant, therefore the Respondent has engaged in requisite unfair labour practice. Finally, he has prayed for declaration of requisite unfair labour practice and other consequential reliefs.

3. The Complainant also made an application (Exh. U-2) under section 30(*2*) of the MRTU & PULP Act to stay execution and implementation of impugned order, pending the hearing and final disposal of main complaint. My learned Predecessor passed ad-interim order staying the impugned order until further orders, with a show cause notice.

4. The Respondent-Divisional Controller filed his say *cum* written statement at Exh. C-2 and traversed some of the material allegations made by the Complainant. He contended that the Complainant was temporarily promoted with effect from 1st July 1981 and, therefore, his pay was required to be fixed as per Corporation's circular dated 28th May 1977. However, the same was fixed incorrectly and, therefore, revised orders were issued fixing proper pay payable to the Complainant. It is then explained that period of employment and the days of promotion of other employees are different and, therefore, their pay-scales are not equal with the Complainant. The Complainant was duly informed as to how his revised pay scale is correct. Finally, the Respondent justified its action and prayed for dismissal of the complaint.

5. Considering rival pleadings, following issues were framed by me at Exh. C-1 :—

(*i*) Does the Complainant prove that the mode of reducing/refixing of his pay scale is contrary to the principles of natural justice and an unfair labour practice under Item 9 of Sch. IV of the MRTU & PULP Act ?

(*ii*) What order ?

6. My findings, on above issues, are as under :—

(*i*) Yes.

(*ii*) The Complaint is partly allowed.

Reasons

7. The factual position arising out of rival pleadings is not in dispute. Admittedly, Complainant's past record is clean and unblamished and he is working on the post of Junior Assistant with effect from 1st July 1981. The Complainant has produced xerox copies of various office orders whereby, his pay was revised as on 1st April 1988 and was paid annual increments. His pay was fixed at Rs. 1,920 with effect from 1st April 1991 *vide* officer order No. 532/91 dated 5/14th September 1991. Impugned office order No. 118/92 dated 15th February 1992 says that office orders Nos. 66 and 532 are cancelled and Complainant's revised pay is fixed at Rs. 1,530 with yearly increments of Rs. 30. He has produced requisite documents with list Exh. U-7. The Corporation has produced various office orders regarding continuation of Complainant's temporary promotion and impugned order, with list Exh. C-3. It has also come on the record that the Corporation did not implement impugned order due to interim order of this Court. The Corporation has then produced comparative chart of pay fixation of the Complainant and one Shri V. S. Rane and circular dated 7th October 1989 with list Exh. C-5. It then produced chart regarding fixation of wages of Junior Assistant Shri Sarang and General Standing Order No. 990, date 9th March 1979, with list Exh. C-6.

8. The Complainant examined himself at Exh. UW-1 whereas the Respondent its Assistant Clerk Shri Anawakar at Exh. CW-1. The Complainant deposed in terms of his pleadings. He denied that Shri Parab joined on 1st November 1973 on the post of Junior Assistant. Corporation's Clerk Shri Anawkar deposed that pay of one increment was wrongly given to the Complainant and Complainant's basic pay is revised as per the settlement of the year 1988 and consequential circular dated 7th October 1989 thereof. He then stated that all such particulars were stated in Office order dated 15th February 1992 and Annexures thereof. He replied in cross-examination that no reasons are stated in office order dated 15th February 1992 as to how Complainant's pay is revised/reduced. He admitted that no previous notice was given to the Complainant about proposed revision of his pay while issuing office order dated 15th February 1992.

9. Shri Pansare, Learned Advocate representing the Complainant submitted that Corporation's plea/explanation regarding revision of Complainant's pay scale is after thought for the obvious reason that alleged annexures to office order dated 15th February 1992 were never delivered to the Complainant. In fact, his pay scale was reduced unilaterally by violating principles of natural justice. He placed reliance on the decision in *R. Srinivasan and Indian Institute of Technology, Madras reported in 1999(2) LLN at page 268(Madras H. C.)*. He then added that the Corporation now cannot justify its action so as to nullify Complainant's plea of violation of principles of natural justice. He then pointed out Complainant's service book as well as alleged agreement of the year 1988 are not produced. As such, unilateral reduction of pay scale is contrary to the principles of natural justice and an unfair labour practice.

10. Shri Badadre, Learned Advocate representing the Corporation countered above arguments and replied that Corporation's circular dated 7th October 1989 highlights all the aspects and justify impugned action. In fact, the pay scale is not reduced but refixed as per the settlement. It is pleaded accordingly in paragraphs Nos. 9 and 15 of the Written Statement.

11. It is held in R. Sriniwasan's case (referred above) that unilateral revision of earlier order and reducing pay scale thereof without hearing concerned employee is not valid in law as reduction in pay scale is in violation of principles of natural justice. There is nothing on record to show that an opportunity was given to the Complainant while reducing/revising his pay scale. As such, the explanation now tried to be given by the Corporation has no legal significance. Advocate Shri Pansare pointed out that Corporation's witness Shri Bhandarkar in other similar complaint [Complaint (ULP) No. 325 of 1996] has admitted that there is no provision in the settlement that period of temporary promotion should not be counted while giving time bound promotion. I, therefore, hold that the mode of reducing/refixing Complainant's pay scale is contrary to principles of natural justice and an unfair labour practice under Item 9 of Sch. IV of the MRTU & PULP Act. Accordingly, I answer Issue No. 1 in the affirmative.

12. Before parting with this order. I must make it clear that an affirmative finding of an unfair labour practice is recorded for violence of principles of natural justice. The Corporation is at liberty to give an opportunity of being heard to the Complainant and then pass appropriate order strictly according to provisions of law.

13. In the result, I pass following order.

Order

(*i*) The Complaint is partly allowed.

(*ii*) It is declared that the Respondent has engaged in unfair labour practice under Item 9 of Sch. IV of the MRTU & PULP Act.

(*iii*) The Respondent is directed to cease and desist from engaging in such unfair labour practice forthwith.

(*iv*) Respondent's order dated 15th February 1992 is set aside.

(*v*) The Respondent is directed to pay difference of wages, if any, to the Complainant, within one month from today. The Respondent is at liberty to pass an appropriate order after extending an opportunity of being heard to the Complainant.

(*vi*) The parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
dated the 29th October 2003.

(Sd.).....
Asstt. Registrar,
Industrial Court, Kolhapur.

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BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

COMPLAINT (ULP) No. 88 OF 1992.—Harun Azamkhan Dafedar, Maharashtra State Electricity Board, Urban Division, Sangli.—*Complainant—Versus*—Superintendent Engineer, Maharashtra State Electricity Board, Circle Office, Vishrambag, Sangli.—*Respondent.*

In the matter of complaint under section 28(*1*) read with items 5, 9 and 10 of Sch. IV of the MRTU & PULP Act, 1971.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri K. D. Shinde, Advocate for the Complainant.

Shri S. R. Rane, Advocate for the Respondent.

Judgment

1. This is a complaint purported to be under section 28(*1*) read with Items 5, 9 and 10 of Sch. IV of the MRTU & PULP Act.

2. Admittedly, the Complainant joined the Respondent-Maharashtra State Electricity Board in the year 1980 as Assistant Lineman. The Board published General Order No. 74 on 30th April 1974, dealing with the subject of promotion to higher post in respect of employees who have remained in a given post for 10 years or more on May, 1974. As per said order, the Board decided to extend special benefits to such an employee who remained on a given post for 10 years or more, without advantage of higher post or higher grade for want of clear vacancies. Such benefit is to be extended irrespective of the fact whether suitable vacancies in the next higher post, are available or not. The Board then modified General Order No.74 *vide* correct Slip No. 9, dated 6th May 1983 where by condition of serving for 10 years came to be reduced to 6 years with effect from 1st April 1980. The Board further modified correction Slip No. 9 by resolution No. 1210 dated 6th November 1984 whereby, benefit of higher post or grade was made available twice instead of once.

3. It is also an admitted position that the Complainant met with an accident in the year 1986 while on duty and then chargesheeted. The Board paid compensation of Rs. 7,500 to him for the injury sustained by him. It is also not disputed that next promotional post to the post of Assistant Lineman is of Lineman.

4. It is case of the Complainant that he has worked for the requisite period on the post of Assistant Lineman and was entitled to pay scale of the post of Lineman with effect from 1st January 1987, as per directions in General Order No. 74. The Board informed him by letter dated 13th May 1991 that he was found unfit for granting benefit of General Order No. 74. It is alleged that adverse remarks in the Confidential Report for the year 1983-84, 1984-85 and 1st April 1987 to 11th November 1987 were communicated to him on one and the same date *i.e.* 12th November 1991 to *malafidely* justify Board's action. In fact, he issued notice dated 21st October 1991 through his Advocate for grant of benefit and, therefore, false adverse remarks were communited to him. It is further alleged that refusal to extend benefit *i.e.* pay of promotional post is illegal and arbitrary. According to the Complainant, therefore, refusal to grant the benefit is an unfair labour practice. Finally, he has prayed for requisite declaration of an unfair labour practice, direction to pay the benefit with effect from 1st January 1987 and other consequential reliefs.

5. Board's Superintendent Engineer filed written statement at Exh. C-9 and traversed some of the material allegations made by the Complainant. He contended, at the outset, that benefit under General Order No. 74 is not automatic and one has to fulfill prescribed qualification and experience. Besides, ability and performance of each employee is to be considered while conferring the benefits of General Order No. 74. Complainant Confidential Reports for the years 1983-84, 1984-85 and 1987-88 were adverse and intimation thereof was given to him on 12th November 1991. The Competent Selection Committee scrutinised all applications in the light of Confidential Reports of concerned employees. It was found by the Committee that the Complainant is not upto the desired standard and unfit. There were adverse confidential reports and, therefore, the Complainant was found unfit. Thus, the Superintendent Engineer justified Board's Action and finally prayed for dismissal of the complaint.

6. Considering rival pleadings, following points arise for my determination :—

(*i*) Does the Complainant prove that he was legally entitled to get General Order No. 74 benefit with effect from 1st January 1987 ?

(*ii*) Does the Complainant prove that Board's refusal to grant such benefit is arbitrary and without application of mind ?

(*iii*) Does the Complainant prove that the Board has engaged in an unfair labour practice under Item No. 9 of Sch. IV of the MRTU & PULP Act ?

(*iv*) What order ?

7. My findings, on above points, are as under :—

(*i*) No.

(*ii*) No.

(*iii*) No.

(*iv*) The complaint is dismissed.

Reasons

8. I must state at the thrashhold itself that the Board granted requisite benefit to the Complainant with effect from 1st April 1992 and copy of said order is produced by Respondent's counsel, with list Exh. C-12. As such the controversy is restricted only for the period from 1st January 1987 to 31st March 1992.

9. The Complainant examined himself at Exh. UW-1 and deposed in terms of his pleading. He denied that he was awarded punishment of censure but admitted that case of each employee is scrutinised by competent committee to decide eligibility for the benefit. No oral evidence was adduced by the Respondent.

10. Shri Shinde, Learned Advocate representing the Complainant submitted that Board's action is contrary to the object and scheme of General Order No. 74. In fact, the same was issued to overcome non-promotion for want of clear vacancies. In addition, there are no reasons in Board's letter dated 13th May 1991 as to how the Complainant was found unfit. Therefore, refusal to grant the benefit amounts to an unfair labour practice.

11. Shri Rane, Learned Advocate representing the Respondent replied that Complainant's confidential reports were admittedly, adverse. There cannot be automatic entitlement to the benefit and the Board is justified in finding the Complainant unfit. Otherwise, fitness for promotion was necessary and the benefit cannot be automatic. The Complainant was found fit and then was granted the benefit with effect from 1st April 1992. He further submitted that the scheme *i.e.* General Order No. 74 is made crystal clear in Division Bench's Division of Bombay High Court in *Maharashtra State Electricity Board* Vs. *Dinkar Sadashiv Sane reported in 1993 I CLR at page 865.*

12. The decision relied by Advocate Shri Rane is regarding interpretation of General Order No. 74. It is held that entitlement to the benefit is not automatic and fitness for being promoted is necessary. It is observed as under :—

> "In case the employee is guilty of any charge or the Confidential Reports of such employee indicates that he is misfit for the promotion or the employee has not passed necessary examination, then in such case, the employee cannot demand higher grade as a matter of right."

13. In the light of above observations, I hold that benefit under General Order No. 74 is not automatic and cannot be claimed as of right. Besides, the confidential reports of the Complainant, for the relevant period, were adverse. His case was scrutinised by the Competent Committee and he was found unfit. Even otherwise, decision of Competent Selection Committee cannot be a matter of judicial review.

14. In the background of above discussions, I hold that the Board was well justified in refusing to grant benefit, the Complainant cannot claim the benefit as of right and no unfair labour practice is proved. Accordingly, I answer Point Nos.1 to 3 were in the negative and pass following order.

Order

(*i*) The Complaint is dismissed.

(*ii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
dated the 14th July 2003.

(Sd.).....
Asstt. Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

COMPLAINT (ULP) No. 159 of 1993.—Ravindra Nemu Kane, Ward No. 9, House No. 276, Zenda Chowk, Ichalkaranji.—*Complainant*—*Versus*—The Chief Officer, Ichalkaranji Municipal Council, Ichalkaranji.—*Respondent.*

In the matter of complaint under section 28(*1*) read with item 9 of Sch. IV of the MRTU & PULP Act, 1971.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Smt. N. A. Ramtirthakar, Advocate for the Complainant.

Shri R. L. Chavan, Advocate for the Respondent.

Judgment

1. This is a complaint under section 28(*1*) read with Item 9 of Sch. IV of the MRTU & PULP Act.

2. Admittedly, the Complainant started working under the Respondent-Ichalkaranji Municipal Council on the post of clerk on daily wage, basis from 22nd February 1980. He was given technical breaks and then made permanent on 1st June 1981 on the post of clerk.

3. It is case of the Complainant that he was directed to work under Council's Audit Department from 22nd February 1980 itself. He was entrusted with the duties and work of a Junior Assistant Auditor since then. As such, he is discharging duties of a Junior Assistant Auditor from the date of joining the Council although is appointed on the post of a Clerk. His past record is totally clean and unblamished and no single misconduct is to his credit. He is doing work of a Junior Assistant Auditor since beginning till today. As such, he is entitled to wages as per the scale of post of Junior Assistant Auditor on the principle of "equal pay for equal work". But the Council has violated the same. He requested, time and again to consider his case sympathetically and pay wages of the post of Junior Assistant Auditor but there was no response from the Council. It is further contended that the Council ought to have confirmed him from 22nd February 1988 itself and it was recommended accordingly by Council's Chief Officer to the Director of Municipal Administration. He made a written application on 1st June 1993 to the Council but it was neither granted nor rejected. It is then contended that failure to grant equal pay for equal work is a continuous cause of action and there is no question of limitation.

4. On above averments, the Complainant has prayed for declaration of an unfair labour practice, directions to grant pay of the post of Junior Assistant Auditor to him from 22nd February 1980, to confirm him on 22nd February 1980 and other consequential reliefs.

5. The Council filed written statement at Exh. C-6 and traversed some of the material allegations made by the Complainant. It contended at the outset that averments regarding continues cause of action are false and no cause of action has arison, as alleged. It is case of the Council that there are in all 9 posts in its Audit Department. Municipal Auditor is the Head of the Department and 5 Junior Assistant Auditor as well as three clerks work under him. The Complainant was appointment as a clerk on daily wages on 22nd February 1980 and then made permanent on same post with effect from 1st June 1981. He is working as a clerk since then till today and is nowhere concerned with the work of internal checking. In fact, he has never discharged duties of a Junior Assistant Auditor but of a clerk. Eventually, he is not entitled to wages of the post of a Junior Assistant Auditor. He was paid difference of Rs. 7,559 on 2nd August 1994 of the post of clerk when his pay scale was revised as per recommendations of 4th Pay Commission. The Chief Officer requested Director of Municipal Administration by letter dated 25th April 1990 to confirm the Complainant on the post of clerk with effect from 22nd February 1980 but there is no reply till today. It is then contended that the complaint is barred on account of misjoinder of causes of action. Finally, the Council prayed for dismissal of the complaint.

6. Considering rival pleadings, following issues were framed by me at Exh. O-1 :—

(*i*) Does the Complainant prove that he is exclusively doing work of Junior Assistant Auditor from 20th June 1980 ?

(*ii*) Does the Complainant prove that he is entitled to wages of the post of Junior Assistant Auditor on the principle of 'equal pay for equal work' ?

(*iii*) Whether the Complainant is entitled to permanency on the post of Junior Assistant Auditor and that too with effect from 22nd February 1980 ?

(*iv*) Does the Complainant prove that the Respondent has indulged into an unfair labour practice under Item 9 of Sch. IV of the MRTU & PULP Act ?

(*v*) What order ?

7. My findings on above issues, are as under :—

(*i*) Yes.

(*ii*) Yes, with effect from 1st June 1981.

(*iii*) No.

(*iv*) Yes.

(*v*) The complaint is partly allowed.

Reasons

8. The issue regarding permanency with effect from 22nd February 1980 and that too on the post of Junior Assistant Auditor is of paramount consideration and is considered first. The Complainant has produced various documents with list Exh.U-2, U-9 and U-14. None of them are denied by the Council. Council's Chief Officer has issued a certificate on 23rd April 1990 regarding working days of the Complainant from 22nd February 1980 to 18th May 1991 as a clerk on daily wages. It is stated in said certificate that the Complainant is confirmed with effect from 1st June 1981. The Chief Officer has also sent a letter dated 25th April 1990 to the Director of Municipal Administration to confirm the Complainant from 22nd February 1980. Copies of letter and Certificate are produced with list Exh. U-2.

9. Smt. Ramtirthakar, learned Advocate representing the Complainant submitted that there was no propriety in giving artificial/technical breaks to the Complainant. In addition, the Chief Officer has certified Complainant's case by recommending his confirmation with effect from 22nd February 1980. As such, the Council ought to have confirmed him from the date of joining itself.

10. Shri Chavan, learned Advocate representing the Council replied that the Complainant was admittedly appointed on daily wages basis and not on a vacant post. Confirmation of an employee is subject to sanction of the Director of Municipal Administration. The Director has all powers as provided under section 76(*2*) of the Maharashtra Municipalities Act. The Director has not replied to Chief Officer's letter dated 25th April 1990. As such, the Complainant is not entitled to be confirmed with effect from 22nd February 1980. He then submitted that the Complainant is not admittedly appointed on the post of Junior Assistant Auditor and cannot claim permanency on said post merely on the plea that he is doing similar work.

11. Admittedly, the Complainant was initially appointed as a clerk on daily wages basis and then confirmed on same post with effect from 1st June 1981. Section 76(*2*) of the Maharashtra Municipalities Act empowers the Director of Municipal Administration to determine not only the qualification but other conditions of service and the method of recruitment. Naturally, Complainant's confirmation was within his powers. He is not made a party to the complaint. In such circumstances, it cannot be accepted that the Council ought to have confirmed the Complainant with effect from 22nd February 1980. Further plea of confirming him on the post of Junior Assistant Auditor cannot be accepted in any case, for the obvious reason that he was appointed on the post of clerk. One may be entitled to the scale of higher post on the principle of 'equal pay for equal work' but that cannot automatically entitle him to be made permanent on the higher post. I, therefore, hold that the Complainant has failed to prove that the Council ought to have confirmed him from 22nd February 1980 and that too on the post of Junior Assistant Auditor. Accordingly, I answer Issue No. 3 in the Negative.

12. It has come on the record that the Complainant was put incharge of the post of Junior Assistant Auditor as and when concerned employees on said post, were on leave. Orders thereof are produced with list Exh. U-9/1 to 7. The Complainant has stated in his examination-in-chief itself that he is paid additional wages for the respective periods when was put from time to time incharge of the post of concerned Junior Assistant Auditor. He has then produced office orders dated 12th April 1984 and 31st July 1992 issued by the Municipal Auditor regarding allotment of duties, with list Exh. U-9/8 and 9. Other 7 Office orders issued between 9th June 1998 to 9th January 2002 regarding allotment of work to the Complainant and other Junior Assistant Auditor are produced with list Exh. U-14/6. In addition, the Complainant has examined himself at Exh. UW-1 and Council's retired Municipal Auditor Shri Katkar at Exh. UW-2. No oral or documentary evidence is adduced by the Council.

13. The Complainant has deposed that there is one post of Municipal Auditor and 5 posts of Junior Assistant Auditor under Council's Audit Department. Educational Qualification for the post of Clerk is S. S. C. whereas Junior Assistant Auditor is B. Com. or S. S. C. + L. S. G. D. + experience of 10 years. He secured Bachelors degree in Commerce in the year 1978 and is permanently doing work of Junior Assistant Auditor since 22nd February 1980. He was directed by Municipal Auditor, from time to time to take check pay bills of Head Office and Water Supply Department. Presently all 5 posts of Junior Assistant Auditor are vacant. He denied that there are 9 posts under Council's Audit Department which include 3 clerks. He stated that he and other two employees were working as clerks in Audit Department in the year 1993. He denied that he is doing work as asked by Junior Assistant Auditor.

14. Ex-Municipal Auditor Shri. Katkar has worked as Municipal Auditor from the year 1968 to 2000. He testified that there were six sanctioned post in Audit Department *i.e.* one Municipal Auditor and five Junior Assistant Auditor. He ratified his various office orders regarding allotment of work with list Exh. U-14/1 to 3. He categorically deposed that he has a entrusted duties of the post of Junior Assistant Auditor to the Complainant from the year 1980 till retirement and Complainant's responsibility as well as accountability was exclusively of a Junior Assistant Auditor. He denied that there were three sanctioned posts of clerks. He also explained that the Complainant was put incharge of post of other junior auditors who was holding the charge in addition to his own work of a Junior Assistant Auditor. It has come in his evidence that he requested the Chief Officer in the year 1980 to provide more Junior Assistants and then the Complainant was asked to work under the Audit Department. He has categorically deposed that the Complainant all the while checked work of other/clerks like of a Junior Assistant Auditor.

15. Advocate Smt. Ramtirthakar argued that Complainant's reply in the cross examination that he was working as clerk in Audit Department does not mean that he was discharging duties of the post of a clerk. It is not in dispute that he is working in Audit Department since the date of joining *i.e.* 22nd February 1980. Ex-Municipal Auditor has clearly deposed that there were no posts of clerks in Audit Department. In fact, there is no necessity of the post of clerk in Audit Department as work of other clerks is required to be checked by Audit Department. Therefore, naturally, there must be exclusive post of Junior Assistant Auditor in Audit Department. In such circumstances, it was for the Council to establish by cogent and satisfactory evidence that some posts of clerks were sanctioned for Audit Department. But the Council has not led any evidence and failed to establish its case. On the other hand, there is better oral as well as documentary evidence like number of office orders and deposition of Ex. Auditor Shri Katkar. It is not case of the Council that the Complainant has no requisite educational qualification to work as Junior Assistant Auditor. Complainant's version regarding prescribed educational qualification for both posts is not challenged and stands unrebutted. Office orders *cum* Distribution Chart clearly establish that the Complainant was exclusively doing work of Junior Assistant Auditor and is entitled to wages of said post on the principle of 'equal pay for equal work.' Breach of this principle is continuous one. She therefore, relied on decision in Alvare Noronh Ferriera and Another *V/s.* Union of India and Others reported in 1999 I CLR at page 1164 (S. C.).

16. Advocate Shri Chavan countered above arguments and replied that the Complainant has to stand or fall on his own legs and his admission that he was working as Clerk under Audit Department is conclusive. Leave Orders of other Junior Assistant Auditor say that their charge is kept with the Complainant and he is designated as clerk in those orders. The very fact that the complaint is filed in the year 1993 is well indicative of *malafides.* He further submitted that Municipal Auditor Shri Katkar has now retired and therefore deposing to help of the Complainant.

17. It is evident to note that the Council has not led rebuttal evidence to prove that there were three sanctioned posts of clerk for its Audit Department. Mere pleading in the written statement, therefore, is insufficient. The Complainant is admittedly appointed as a clerk. Eventually, he cannot be shown on record as Junior Assistant Auditor. It is plain case of the Complainant that he was appointed as a clerk but doing work of the post of Junior Assistant Auditor and is entitled to scale of said post on the principle of 'equal pay for equal work'. As such, his designation as clerk in leave orders is inconsequential. It is not case of the council that the Complainant has no requisite qualification prescribed for the post of Junior Assistant Auditor. It has come in evidence that he had requisite educational qualification to work on the post of Junior Assistant Auditor, prior to joining the service.

18. There are various factors which need to be considered before claiming parity on the principle of 'equal pay for equal work'. It is applicable when employees are performing similar function and discharging similar duties and responsibilities but they are denied equality in the matters relating to the scale of pay. In my judgment, responsibility and accountability are the crucial tests for claiming parity in service. Office orders dated 12th August 1984, 31st July 1992 and other six orders between the period 9th June 1998 to 2nd January 2002 show that the Complainant was directed to check audit bills of Head Office and Water Supply Department. He was then directed to check running and final bills of contractors, water bills, relevant orders and other concerned record. It is not necessary to reproduce the duties allotted to him, from time to time, by respective office orders. A perusal thereof establishes that he was exclusively doing work and duties of a Junior Assistant Auditor. He is solely entrusted with the duties of checking various files, bills etc. and there is no scope to work as a Clerk while discharging those duties. In addition, his Head of Department *i.e.* Ex-Municipal Auditor Shri Katkar has deposed in unequivotal terms that responsibility and accountability of the Complainant was exclusively of a Junior Assistant Auditor and he (the Complainant) has worked as in-charge of other Junior Assistant Auditors in addition to his own work of Junior Assistant Auditor. Thus, it has clearly come on the record that the Complainant was exclusively doing work of Junior Assistant Auditor and his responsibility as well as accountability was similar to that of a Junior Assistant Auditor. There is no rebuttal evidence by the Council to prove that he was exclusively doing work of a clerk.

19. No doubt, the Complainant has not immediately complained that h is not paid equal wages for equal work. Advocate Smt. Ramtirthakar has rightly submitted that the Complainant had to work with the Council itself and immediate legal action might be deterimental to his service. Generally no employee immediately rushes to the Court against his employer as he has to work under the same employer. Therefore, failure to immediately claim wages for equal work is well justifiable. It is settled law that unfair labour practices covered under Items 6 and 9 are of recurring nature. The Complainant is still performing similar duties. As such, late filing of the complaint does not make his claim *malafide* or after thought.

20. In the background of above discussed facts and circumstances, I hold that the Complainant was exclusively doing work of Junior Assistant Auditor. There is similarity of responsibility and accountability, in addition to other facts to be considered while claiming parity. As such, Council's failure to pay wages to him of the post of Junior Assistant Auditor despite availing services of a Junior Assistant Auditor, is an unfair labour practice under item 9 of Sch. IV of the MRTU & PULP Act. Consequently, the Complainant is entitled to wages of the post of Junior Assistant Auditor. He is confirmed with effect from 1st June 1981. Prior to such date, he was doing work on daily wages basis. Consequently, there was no accountability for him till his confirmation. Eventually, he is entitled to get equal pay for equal work' with effect from 1st June 1981. Admittedly, he is being paid additional wages while was incharge of other Junior Assistant Auditor. Those, wages are altogether different and are paid being incharge. I answer Issue Nos. 1, 2 and 4 accordingly and pass following order:—

Order

(*i*) The Complaint is partly allowed.

(*ii*) It is declared that the Respondent Ichalkaranji Municipal Council has engaged in unfair labour practice under Item 9 of Sch. IV of the MRTU & PULP Act.

(*iii*) The Council is directed to cease and desist from commission of such unfair labour practice, forthwith.

(*iv*) The Council is directed to pay wages to the Complainant in scale of the post of Junior Assistant Auditor from 1st June 1981 onwards till today, within one month from today.

(*v*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
dated the 12th September 2003.

V. D. Pardeshi,
Asstt. Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

CRIMINAL REVI. APPLICATION (ULP) No. 2 of 1994.—(1) Shri Nandkumar Balkrishna Borade; age 52, Residence Kolhapur; (2) Shri Sarjerao Krishna Koli; age 48, Occu. service, Resident of Ichalkaranji.—*Petitioners*—*Versus*—(1) Shri Subhash Mahadeo Alatekar, H. No. 1364, Pratibhanagar, Datar Colony, Kolhapur; (2) Judge, Labour Court, Kolhapur.—*Respondents.*

In the matter of Revision under section 44 of MRTU & PULP Act, 1971.

CORAM.—Shri C. A. Jadhav, Member.

Advocate.—Shri M. G. Badadare, Advocate for the Petitioners.

Shri V. B. Patil, Advocate for the Respondent.

Judgment

(Dictated in Open Court)

1. This is a Revision by Original Accused Nos. 1 and 2 challenging the order of issuing process under section 48(1) of the MRTU & PULP Act, passed against them, in Cr. U.L.P. No. 9/94 by learned Labour Court, Kolhapur. Admittedly, present Respondent (Herein after referred to as Complainant) filed Complaint (ULP) No. 369/93 against Petitioner No. 1 (Herein after referred to as Accused No. 1) under MRTU & PULP Act. An Interim Order came to be passed in the said Complaint (*vide* Order Below Ex. U-7) directing Accused No. 1 to allow the Complainant to join duties on the post of cleaner, till decision of main complaint.

2. The Complainant than filed above Complaint alleging that both Accused failed to comply Interim Order passed by this Court in Complaint (ULP) No. 369/93. It is alleged that the Accused have intentionally disobeyed the Interim Order and committed offence punishable under section 48(*1*) of the MRTU & PULP Act.

3. The learned Labour Court, on examining the Complainant on oath, passed an order of issuing process against both the accused. Same is challenged in this revision.

4. Now, following points arise for my determination :—

(*i*) Whether impugned order of issuing process is required to be set-aside, at this stage ?

(*ii*) What order ?

5. My findings, on above points, are as under :—

(*i*) No,

(*ii*) The revision application is dismissed.

Reasons

6. Shri Badadare, learned Advocate representing the Accused submitted that the Complainant was informed, time and again to attend the duties, however, failed. The Complainant was well aware of such facts but suppressed them. In the circumstances, it was improper for the Labour Court to issue process against the Accused. But, the Labour Court has passed the impugned order mechanically and without application of mind.

7. Section 40 of the MRTU & PULP Act provides that a Labour Court shall have all powers under Criminal Procedure Code in respect of offences punishable under the said Act. Consequently, the Petitioners Accused can apply for recalling order of issuing process. Honourable Apex Court in *K. Mathew Vs. State of Kerala reported in AIR 1992 S. C. at page 2206* has held that it is open to the accused to plead before the Magistrate for varying or recalling order of process. As such, Learned Labour Court has Jurisdiction to vary and recall an order of issuing process. The Petitioners - Accused can well approach the Labour Court and put all the grievances raised in

this Revision, before the Labour Court. Consequently, no interferences is called for at this stage. Accordingly, I Answer Point No. 1 in the negative and pass following order :—

Order

(*i*) The Criminal Rev. Application is dismissed.

(*ii*) R. & P. be sent to Labour Court, Kolhapur.

(*iii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated the 30th September 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (IC) No. 7 of 1994.—The Managing Director, Shri Datta Sahakari Sakhar Karkhana Ltd., Shirol, Dattanagar, Dist. Kolhapur.—*Petitioner—Versus*—Shri Shankar Annappa Gadve, Plot No. 120, Jayasingpur Co-op. Housing Society, Jayasingpur, Dist. Kolhapur.—*Respondent.*

In the matter of Revision under section 85 of BIR Act.

CORAM.—Shri C. A. Jadhav, Member.

Advocates.—Shri P. R. Rane, Advocate for the Petitioners.

Shri D. N. Patil, Advocate for the Respondent.

Judgment

This is a Revision by Original Respondent an employer challenging legality of order on preliminary point passed in Application (BIR) No. 2/87 by Labour Court, Kolhapur, holding that original application under section 78*(1)* D of the BIR Act is maintainable and not barred by section 59 of the MRTU & PULP Act.

2. Admittedly, present Respondent (hereinafter referred to as the Applicant) was in employment of present Petitioner (hereinafter referred to as the Sugar Factory). He was served with chargesheet *cum* show cause notice dated 19th January 1985 alleging various misconducts. One Advocate was appointed as Enquiry Officer. It appears that the Applicant objected appointment of the Advocate as an Enquiry Officer on the ground that said Advocate regularly represents the Sugar Factory in various Courts. It further appears that the Enquiry Officer completed in enquiry on 14th June 1986.

3. The Applicant then filed Complaint (ULP) No. 141/86 on 16th June 1986 before the Labour Court, Kolhapur against the Sugar Factory alleging unfair labour practice under Items 1(*a*), (*b*), (*d*) and (*f*) of Sch. IV of the MRTU & PULP Act. Learned Labour Court passed *ad-interim* order directing the Sugar Factory to maintain *status quo,* with show cause notice. It then, after hearing both sides, vacated said order on 11th August 1986. It appears that the Applicant then approached this Court by filing a Revision Application. However, interim application therein came to be rejected on 20th August 1986. Eventually, the Applicant was dismissed from service with effect from 21st August 1986.

4. It is also an admitted position that the Applicant then withdraw Complaint (ULP) No. 141/86 on 29th September 1986 by seeking permission of Labour Court to withdraw the complaint without prejudice to his rights to file other proceedings. The Applicant then filed above Application on 12th January 1987 under the BIR Act before the Labour Court, Kolhapur.

5. The Sugar Factory filed its written statement (Exh. C-8) contending that the Applicant failed in the proceedings under the MRTU & PULP Act, is now estopped from agitating same grievance in the application under the BIR Act and said application is barred by express and mandatory provisions of section 59 of the MRTU & PULP Act.

6. Learned Labour Court, on hearing both parties, observed that causes of action in both proceedings are different. It then observed that show cause notice was challenged in the complaint whereas dismissal is challenged in later application. It then held that dismissal or discharge was not challenged in earlier complaint and, therefore, bar under section 59 of the MRTU & PULP Act is not attracted. Ultimately, it held by order dated 30th August 1994 that the application is maintainable and not barred by section 59 of the MRTU & PULP Act. Said order is challenged in this Revision.

7. I heard both Advocates. Considering rival submissions, following points arise for my determination :—

(*i*) Whether impugned order holding that the Application is maintainable and not barred by section 59 of the MRTU & PULP Act, is legal and proper ?

(*ii*) What order ?

8. My findings, on above points, are as under :—

(*i*) Yes.

(*ii*) The Revision Application is dismissed.

Reasons

9. The factual position regarding presentation of Complaint (ULP) No. 141 of 1986 and withdrawal thereof prior of presentation of the application under the BIR Act, is not disputed. On perusal of record and proceeding of the Labour Court, I found that copy of the Complaint filed by the Applicant, was not on record. Therefore, the same is taken on record, in this Revision.

10. Shri P. R. Rane, Learned Advocate representing the Sugar Factory took me through averments in Complaint (ULP) No. 141/86 as well as Application under the BIR Act and argued that averments in both pleadings are identical. He pointed out that there were averments like failure to give opportunity, violation of principles of natural justice and hasty completion of enquiry, are made in the complaint. Similar averments are made in the later Application. He then submitted that the Applicant took effective steps like getting order of *statu squo* and approaching the Revisional Court against the order vacating the *status quo.* He then argued that meaning of the word ' instituted ' appearing in section 59 of the MRTU & PULP Act is significant. It covers four stages *i.e.* presentation of the matter, entertaining the same, trial thereof and the decision. He then placed reliance on the decision in *Shivaji Agricultural College, Amravati Vs. Mukhtyar Ahmed S/o. Haji Mian Sheikh and Another reported in 1987 Mah. L. J. at page 646 (Bombay Division Bench)*. He then argued that filing the Complaint under the MRTU & PULP Act is, therefore, covered by the word instituted and hence the Application under the BIR Act is clearly barred by section 59 of the MRTU & PULP Act. He then submitted that no show cause notice regarding the punishment was served upon the Applicant, however, the Labour Court has misread the facts assuming that a show cause notice regarding the punishment was served upon the Applicant and then he approached on apprehending dismissal.

11. Shri Manolkar, learned Advocate representing the Applicant countered above arguments and replied that the mere fact that the Labour Court presumed that the Applicant approached under the MRTU & PULP Act on receipt of show cause notice, does not make the entire order bad in law. In fact, the averments in the complaint and cause of action thereof, are materially different than in the application. Appointment of the Enquiry Officer, failure to give opportunity to furnish explanation, suppression of material facts, violation of principles of natural justice and hasty completion of the enquiry, were material allegations in the complaint. No enquiry report was delivered to the Applicant when he filed the complaint. Later Application is filed mainly challenging Report of the Enquiry Officer and the dismissal. Naturally, cause of action for later application is different. In addition, the complaint was not finally decided on merits but was withdrawn before final adjudication, the Application is filed thereafter. As such, bar of section 58 of the MRTU & PULP Act is inapplicable. He relied on the decision in *S. S. Miranda Ltd. Vs. Rangbahadur Singh & Others reported in 1988 II CLR at page 277.* He pointed out that decision in case of *Shivaji Agricultural College* is referred in this decision.

12. I must make it clear that no documents regarding Complaint (ULP) No. 141 of 1986 were produced before the Labour Court. Eventually, the Labour Court assumed that the Applicant has approached under the MRTU & PULP Act on issuance of show cause notice regarding the punishment. However, admittedly, the factual position is otherwise. He filed the Complaint contending that he was to examine 11 defence witnesses on 14th June 1986, sought adjournment

to lead defence evidence but it was rejected and the enquiry was unilaterally closed on 14th June 1986 itself. The other averments, are regarding alleged illegalities during the enquiry. It is alleged that misconducts alleged are nowhere connected with his duties. On the contrary, it is alleged in the application under the BIR Act that the Applicant is dismissed after 18 months of the date of the chargesheet. It is contended that his dismissal is by way of victimization, the enquiry is contrary to principles of natural justice and is totally illegal. The cause of action is his dismissal.

13. Considering above factual position, in my judgment, the complaint and alleged application are materially different. The stage of termination had not reached while filing the complaint. In addition, causes of action for both proceedings are different. Likewise, the complaint was not finally decided on merits but came to be withdrawn and then application under the BIR Act came to be filed. The Labour Court has to decide under the MRTU & PULP Act as to whether an unfair labour practice is committed. However, it has to decided legality and propriety of an order while exercising jurisdiction under section 78(2) D of the BIR Act. As such, jurisdiction under both Acts is not identical. Decision in case of Shivaji Agricultural College (referred above) is referred in S. S. Miranda Ltd. *Vs.* Rangbahadur Sing's case (referred above). In the decision in S. S. Miranda Ltd. interim relief was prayed, but was rejected and then the workers were dismissed from service. The State Government referred the dispute for adjudication. In the mean time, the complaints before the Labour Court were withdrawn and therewere no complaints pending before the Labour Court. It is observed by His Lordship that bar under section 59 of the MRTU & PULP Act would not apply. The facts therein are quite identical to the facts of this case. The later application is regarding actual dismissal. Causes of action are different. Averments in both proceedings are materially different. I, therefore, find that learned Labour Court has rightly held that the Application under the BIR Act is maintainable and not barred under section 59 of the MRTU & PULP Act. Accordingly, I answer Point No. 1 in the affirmative and pass following order.

Order

(*i*) The Revision Application is dismissed.

(*ii*) Parties shall appear before the Labour Court on 26th September 2003.

(*iii*) The Labour Court is directed to decide Original Application expeditiously.

(*iv*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated the 11th September 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

———————

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

CRIMINAL REVISION APPLICATION (ULP) No. 8 OF 1994.—(1) Shri Ishwara Balvant Patil, Chairman, Kalammadevi Sahakari Doodh Vyavasaik Sanstha Ltd., Madur, Tal. Bhudargad, Dist.Kolhapur, (2) Shri Pandurang Bhairu Kasar, Secretary, Kalammadevi Sahakari Doodh Vyavasaik Sanstha Ltd., Madur, Tal. Bhudargad, Dist. Kolhapur.—*(Accused Nos. 1 and 2) Petitioners—Versus*—Shri Ganapati Laxman Nandulkar, R/o. Madur, Tal. Bhudargad, Dist. Kolhapur.—*Respondent.*

In the matter of Revision under section 44 of the MRTU & PULP Act, 1971.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri A. D. Patil, Advocate for the Accused Nos. 1 & 2.

Shri U. B. Jadhav, Advocate for the Respondent.

Judgment

1. This is a Revision by Original Accused Nos. 1 and 2 challenging legality of order passed below Exh. U-1 in Criminal Complaint (ULP) No. 15/94 by Labour Court, Kolhapur whereby an order of issuing process under section 48*(1)* of the MRTU & PULP Act, is passed against them.

2. Admittedly, present Respondent (hereinafter referred to as the Complainant) filed Complaint (ULP) 235 of 1993 before the Labour Court, Kolhapur against present Petitioners alleging unfair labour practice under the MRTU & PULP Act. He also made interim Application (Exh. U-2) therein to direct the Respondent therein *i.e.* present Petitioners to allow him to join duty learned Labour Court, after hearing both parties, allowed said interim application on 22nd June 1994 directing present Petitioners to allow him to join duties, till decision of main complaint.

3. The Complainant then filed above criminal complaint against the Petitioners alleging that they failed to comply the interim order, though he requested time and again to allow him to join duties. Finally, it was alleged that Accuses Nos. 1 and 2 have committed an office punishable under section 48*(1)* of the MRTU & PULP Act, 1971.

4. Learned Labour Court, on examining the Complainant on oath, passed an order on 11th July 1994 of issuing process against the accused observing that they did not allow the Complainant to join duties. Said order is challenged in this Revision.

5. Now, following points arise for my determination :—

(*i*) Whether impugned order issuing process is required to be set-aside, at this stage ?

(*ii*) What order ?

6. My findings, on above point, are as under :—

(*i*) No.

(*ii*) The Revision Application is dismissed.

Reasons

7. Shri. Patil, learned advocate representing the Petitioners *i.e.* Accused Nos. 1 and 2 argued that they were not parties to original complaint and the interim order was stayed by this Court. In such circumstances, it was improper for the Labour Court to issue process against both Accused. But the labour Court has not applied its mind to all facts and circumstances and mechanically passed order of issuing process. He then submitted that impugned order be quashed and set aside.

8. Section 40 of the MRTU & PULP Act provides that a Labour Court shall have all the powers under Criminal Procedure Code in respect of offences punishable under said Act. Consequently, the Petitioners-accused can apply for recalling order of issuing process. Honourable Apex Court in *K. Mathew Vs. State of Kerala reported in AIR 1992 S. C. at page 2206* has held that it is open to the Accused to plead before the Magistrate for varying or recalling order of process. As such, learned Labour Court has jurisdiction to vary and recall an order of issuing process. The

Petitioners-Accused can well approach the labour Court and put all the grievances raised in this Revision, before the Labour Court. Consequently, no interference is called for at this stage. Accordingly, I answer Point No. 1 in the negative and pass following order.

Order

(*i*) The Criminal Revision Application is dismissed.

(*ii*) R. & P. be sent to Labour Court, Kolhapur.

(*iii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
dated the 31st July 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

———————

IN THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (ULP) No. 27 OF 1994.—Shri Ishwara Bhau Jadhav, At Vashi, Post Lalegaon, Taluka Walwa, District Sangli.—*Petitioner*—*Versus*—(1) The Depot Manager, Maharashtra State Road Transport Corporation, Shirala Depot, Shirala, District Sangli; (2) The Judge, Labour Court, Sangli.—*Respondent Nos. 1 and 2.*

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri D. N. Patil, Advocate for the Petitioner.

Shri M. G. Badadare, Advocate for the Respondent No. 1.

Judgment

(Dated the 21st July 2003)

1. This is a Revision by Original Complainant challenging legality of judgment and order passed in Complaint (ULP) No. 233/1991 by Labour Court, Sangli, whereby relief of reinstatement, continuity of service etc. is refused by dismissing his complaint.

2. Admittedly, present Petitioner (hereinafter referred to as 'the Complainant') started working under present Respondent No. 1 (hereinafter referred to as 'the Corporation') as a conductor in the year 1978. The Corporation served charge-sheet dated 15th October 1990 upon him for misconducts under Clauses-10, 11, and 35 of its Discipline and Appeal Procedure mainly alleging irregular attendance, absent without leave and without reasonable cause and absence without prior permission. Then an enquiry took place. The enquiry officer held that all misconducts are proved. Ultimately, the Complainant was dismissed from service *w.e.f.* 22nd June 1991.

3. It is case of the Complainant that he gave proper explanation to the charge-sheet. Even then, enquiry was initiated against him. In fact, he was ill, his near relative was admitted in the hospital and hence was unable to attend duties from 4th September 1990 to 14th October 1990. His such explanation was no where considered and a farce of enquiry was made. It is further alleged that findings of the enquiry officer are perverse. It is then contended that his past clean record was not considered and the punishment is an unfair labour practice. Finally, he prayed for requisite declaration and usual reliefs.

4. The Corporation filed its written statement at Exh. C-5 contending that the Complainant was in the habit of remaining absent without prior permission and without reasonable ground. His past record contains similar misconducts. As such, he was required to be charge-sheeted. Proved misconducts were serious, his past record was considered and then proper punishment of dismissal was awarded. Finally, the Corporation justified its action and prayed for dismissal of the complaint.

5. The parties then went to the trial. The Complainant stated *vide* purses Exh.U-7 that he does not wish to challenge legality of the enquiry. None of the parties led oral evidence. The Corporation produced copies of enquiry papers and Complainant's default card.

6. Learned Labour Court, on perusal of evidence and hearing both parties, observed that the Complainant is punished four times in the past for similar misconducts but did not improve himself. Findings of the enquiry officer are well justified. Finally, it held that it is a case of chronic absenteeism and punishment of dismissal is not an unfair labour practice. Ultimately, it dismissed the complaint on 12th January 1994. Said decision is challenged in this revision.

7. I heard both Advocates. Considering rival submissions, following points arise for my determination :—

(*i*) Whether impugned finding that the findings of the enquiry officer are justified is legal and proper ?

(*ii*) Whether impugned finding that punishment of dismissal is justified, is legal and proper ?

(*iii*) What order ?

8. My findings, on above points, are as under :—

(*i*) Yes.

(*ii*) Yes.

(*iii*) The Revision Application is dismissed.

Reasons

9. This being a revision under section 44 of the MRTU & PULP Act, it is not necessary to scrutinise rival pleadings meticulously. The only material question is whether impugned decision is perverse or justified ?

10. It is not in dispute that the Complainant was absent from duty from 4th September 1990 to 14th October 1990. It is also an admitted position that he was served with registered notice dated 8th October 1990 to join services within 24 hours from its receipt. The Complainant received said letter on 12th October 1990 but joined on 16th October 1990. Consequently, it has to be accepted that he was absent without permission. According to the Complainant, he was sick, his relative was admitted in the hospital and hence could not attend the duties. But no evidence is produced before the enquiry officer as well as the Labour Court to justify or establish a sufficient cause. As such, findings of the enquiry officer cannot be faulted with. Accordingly, I answer Point No. 1 in the affirmative.

11. Shri Patil, learned Advocate representing the Complainant, submitted that the Complainant was in employment since the year 1978 and only four incidents of absence till the year 1990 can not make his absence to be chronic one. He sent application for leave but it was not accepted. In addition, he sent a telegram. It is not a case of misappropriation or dishonesty. Therefore, extreme punishment of economic death is certainly unjustified and shockingly disproportionate. He then submitted that an opportunity to improve himself ought to have been extended by the Labour Court. Finally, he submitted that appropriate relief may be granted in favour of the Complainant.

12. Shri Badadare, learned Advocate representing the Corporation, replied that the Complainant was punished four times for similar misconducts but did not improve. There is no cause much less sufficient cause for the absence of one month and ten days. There was no difficulty in informing genuine difficulties. No evidence is brought on record regarding illness and alleged justification is usual as well as afterthought. As such, he cannot be foisted upon the Corporation.

13. It is interesting to note that no evidence was adduced either in the enquiry or before Labour Court regarding alleged cause or justification for absence. It is vaguely contended that the Complainant was ill. No particulars thereof are brought on record. Same is the case regarding hospitalisation of his near relative. Thus, plea of illness and admission of near relative in the hospital appears to be afterthought. Nothing prevented the Complainant from informing the Corporation about his inability to attend the duties. Advocate Shri Badadare rightly explained that entire schedule gets hampered due to absence of a conductor, causes inconvenience to the public as well as the Corporation and other conductors are required to pay overtime wages and all such aspects speak voluminously. In my judgment, usual excuse of illness and seriousness or death of near relative cannot be accepted without satisfying or convincing evidence. It is held in *North Waste Karnataka Transport Corporation* Vs. *Fernandes reported in 2001 (89) FLR at p.813* that unauthorised absence from duty has very serious disruptive effect on employer's services, Courts will have to construe the provisions strictly and punishment in consonance with the gravity of misconduct have to be imposed. In this decision, a note of caution is directed to Industrial Courts and Tribunals observing that reinstatement in a mechanical mode requires to be disapproved of unless facts and circumstances of a peculiar case judiciously fully justify such an order. It is also observed that mechanical reinstatements create a premium on indiscipline, those persons become virtually uncontrollable on next occasion and are the worst possible example to their colleagues. It is also observed in *M.D. Kawade* Vs. *Mahindra Engineering & Chemicals Products Ltd.* reported in 2000 I CLR at p.545 that a workman must be always 'at work' and not 'away from work' and that

should be our 'work culture'. Considering observations in above decisions. Complainant's absence cannot be construed as a technical or minor misconduct. Complainant's back record serves as a barometer for punishment. He was punished four times for similar misconducts but did not improve. His continuous absence, and that too without proper explanation shows that he has no regards for his duty as well as towards his employer. Consequently, he cannot be foisted upon the Corporation by taking a sympathetic view. I, therefore find that the learned Labour Court has rightly held that punishment of dismissal is not shockingly disproportionate. Accordingly, I answer Point No. 2 in the affirmative.

14. To summaries, there is no arbitrariness or perversity in impugned decision. On the contrary, there is every substance in its reasoning. As such, no interference is called for.

15. Finally, I pass following order.

Order

(*i*) The Revision Application is dismissed.

(*ii*) Parties shall bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
dated the 21st July 2003.

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BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (ULP) No. 80 of 1994 & 104 of 1994.—Shri. Vasudeo Chandrakant Pednekar; At Dhuriwada, Post Malvan, Tal. Malvan, District Sindhudurg.—*Petitioner [Respondent of Revision (ULP) No. 104/94]—Versus*—The Principal, Government Polytechnic, Malvan, District Sindhudurg.—*Respondent* [*Petitioner of Revision (ULP) No. 104/94].*

In the matter of Revisions under section 44 of the MRTU & PULP Act.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri D. N. Patil, Advocate for the Petitioner.

Shri D. J. Mangsule, Assistant Government Pleader for the Respondent No. 1.

Judgment

These Revisions are arising out of judgment and order passed in Complaint (ULP) No. 151/1990 by Labour Court, Kolhapur, whereby an employer is directed to reinstate an employee with continuity of service by confirming order of interim temporary reinstatement.

2. Revision Application (ULP) No. 80 of 1994 is filed by the employee (hereinafter referred to as the Complainant) challenging legality of impugned decision to the extent of refusal of back wages for the intervening period from 27th July 1990 to 31st January 1991. Revision (ULP) No. 104/90 is filed by the employer challenging the entire decision.

3. Admittedly, the Complainant was appointed on the post of Turner in establishment of Government Polytechnic, Malvan by order dated 29th April 1990 for a period of 29 days with effect from 24th April 1989. It is stated in Appointment order that he is temporarily appointed for a period of 29 days or till appointment of a regular candidate from the Deputy Director, whichever is earlier. He was then appointed on the post of Plumber in similar fashion from 21st September 1989 from time to time by separate orders. Finally, he was relieved from services on 27th July 1990.

4. It is case of the Complainant that his name was recommended by the Employment Exchange and was appointed against a vacant post, after an interview. He has requisite educational qualifications to work as a plumber. He had put continuous service of more than 240 days although was given artificial breaks. As such, his termination is in violation of mandatory provisions under sections 25-F and 25-G of the I. D. Act., which is an unfair labour practice under items 1(*a*), (*b*), (*d*) and (*f*) of Schedule III of the MRTU & PULP Act. The Complainant also filed an Application (Exh. U-2) to direct the employer to allow him to join duties, till decision of main complaint.

5. The employer filed his say cum written statement at Exh. 19 contending, *inter alia,* that the Complainant was appointed temporarily for a specific period of 29 days stating that his services would be terminated at any time, without assigning any reason. He was appointed subject to approval of the Deputy Director. Besides, he has not put continuous service of 240 days, as alleged. The Complainant ought to have approached Maharashtra Administrative Tribunal and cannot invoke jurisdiction under the MRTU & PULP Act. Finally, the employer prayed for dismissal of the interim application as well as the complaint.

6. I must state at this stage itself that the Labour Court passed *ad-interim* order directing the employer to allow the Complainant to join duties, until further orders. Eventually, the Complainant was allowed to join duties with effect from 31st January 1991. *Ad-interim* order was confirmed on 29th May 1993, after hearing both parties. Thus, the Complainant is in employment from 31st January 1991 till today.

7. Considering rival pleadings, learned Labour Court framed issues at Exh. 21 and the parties went to the trial. No oral evidence was adduced by both parties. The Complainant produced his 11 appointment orders and alleged termination order dated 27th July 1990, with list Exh. U-4. The employer produced copy of confidential letter dated 2nd February 1994 of Secondary Services Selection Board recommending a candidate on the post of plumber.

8. Learned Labour Court, on perusal of documentary evidence and hearing both parties, observed that the Complainant has put continuous service of 240 days in a twelve calender months immediately preceding the date of his termination and the appointment orders do not state that the Complainant is appointed till availability of a candidate from the Selection Board. It further held that the Complainant is appointed against vacant post to do work of perennial nature and no case under section 2(00)(bb) of the I. D. Act is proved. Finally, it held that the termination is bad in law, and allowed the complaint on 2nd April 1994. Said decision is challenged in these Revisions.

9. I heard both sides. Considering rival submissions, following points arise for my determination :—

(*i*) Whether impugned decision directing continuation of interim temporary reinstatement with continuity of service, warrants interference ?

(*ii*) Whether impugned decision of not granting wages for the intervening period *i.e.* from termination till interim temporary reinstatement, warrants inference ?

(*iii*) What order ?

10. My findings, on above points, are as under :—

(*i*) No.

(*ii*) No.

(*iii*) Both Revision Applications are dismissed.

Reasons

11. These being Revisions under section 44 of the MRTU & PULP Act, it is not necessary to scrutinise rival contentions meticulously. The only material question is whether documents on record are incapable of supporting impugned decision. In other words, whether impugned decision is perverse or justifiable.

12. Learned Assistant Government Pleader tried to canvas that the Complainant was appointed for a specific period and purpose. As such, it was not necessary to pay retrenchment compensation. It is stated in appointment orders itself that he is appointed temporarily and his services are liable to be terminated without assigning any reason as well as without notice. But the Labour Court totally ignored the material clauses in the appointment orders and recorded a perverse finding.

13. Shri. Patil, learned Advocate representing the Complainant replied that no evidence is brought on record to show that the Complainant was appointed for a specific purpose. On the contrary, he is appointed on the vacant post. The very clause in appointed order that the services are liable to be terminated without notice and at any time, is contrary to scope of section 2(*00*)(*bb*) of the I. D. Act. Therefore, learned labour Court ought to have granted back wages also.

14. Learned Labour Court has recorded a finding of fact that the Complainant has put in more than 240 days services in twelve calender months, immediately preceding the date of his termination. It is settled law that artificial or notional breaks do not affect continuity of service. Burden lies upon the employer to establish that there was a contract of employment and the termination is result of non-renewal of contract. However, respective appointment orders do not establish the case under section 2(*00*)(*bb*) of the I. D. Act. The very facts that the Complainant was appointed after an interview and against vacant post show that he was not appointed for a specific periods and purpose. I, therefore, find that learned labour Court has rightly disbelieved employer's plea by allowing the complaint. As regards refusal to pay back wages for the intervening marginal period, there is no evidence by either parties. In addition, the Complainant is still in employment. In such circumstances, impugned decision does not warrant any interference on any count. Accordingly, I answer Point Nos. 1 and 2 in the negative and pass following order.

Order

(*i*) Both Revision Applications are dismissed.

(*ii*) A copy of this judgment be kept in other Revision Application.

(*ii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
dated the 26th September 2003.

V. D. PARDESHI,
Assistant Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (ULP) No. 101 of 1994.—Assistant Engineer (Gr. I), National Highway Sub Division No. 26, Near New Palace Post Office, Kolhapur.—*Petitioner*—*Versus*—Shri. Balasaheb Suryakant Shinde, 978, A-Shivaji Peth, Natha Gole Talim, Kolhapur.—*Respondent.*

In the matter of Revision under section 44 of the MRTU & PULP Act.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri D. J. Mangsule, Assistant Government pleader for the Petitioner.

Shri D. S. Desai, Advocate for the Respondent.

JUDGMENT

1. This is a Revision by Original Respondent challenging legality of order passed below Exh. U-2 in Complaint (ULP) No. 47 of 1994, by Labour Court, Kolhapur whereby he is directed to allow Original Complainant to join his duties, till decision of main complaint.

2. Present Respondent filed above complaint alleging unfair labour practices under various clauses of Item 1 of Sch. IV of the MRTU & PULP Act, *interalia,* contending that he was in employment of present Petitioner from October, 1985 but is illegally terminated by order dated 1st July 1994. He also contended that he was orally terminated in the year 1988, then approached Labour Court and sought relief. A dispute regarding permanency of employees working under the petitioner bearing Reference (IT) No. 10/1988 is pending before the Labour Court and his termination without permission of the Industrial Court, is bad in law. He also made interim Application (Exh. U-2) to direct present Petitioner to allow him to join duties, till decision of main complaint.

3. The Petitioner objected the complaint, *vide* say *cum* written statement at Exh.10, contending that the Complainant was employed as a when work was available and never put continuous service of more than 240 days in one calender year. As such, his discontinuation is not an unfair labour practice. It was then contended that Complainant (ULP) No. 91 of 1988 was disposed of being premature. Even then, he was employed as and when work was available. Lastly, it prayed for dismissal of the interim application as well as the complaint.

4. Learned Labour Court, on hearing both parties, observed that the Complainant has worked for more then 8 years and no material is placed on record that now no work is available. It then directed the Petitioner to allow the Complainant to join duties till decision of main complaint and allowed the application, as above, on 29th March 1994. Said order is challenged in this Revision.

5. I heard both sides. Considering rival submissions, following points, arise for my determination :—

(*i*) Whether impugned inter locator order passed in the year 1994 directing interim temporary reinstatement, warrants interference.

(*ii*) What order ?

6. My finding, on above points, are as under :

(*i*) No.

(*ii*) The Revision Application is dismissed.

Reasons

7. This being a Revision under section 44 of the MRTU & PULP Act, it is not necessary to scrutinise rival pleadings meticulously. The only material question is whether documents on record are incapable of supporting impugned order. In other words, whether impugned order is perverse or unjustifiable ?

8. It is not disputed by the Petitioner that the Complainant was in employment since the year 1985 and has worked from time to time, every year. No material was produced before the Labour Court that no work was available and hence Complainant's services were discontinued. Complainant's employment from the year 1985, *prima facie* spells that he was doing work of perennial nature. I, therefore, find that learned Labour Court has rightly exercised discretion in favour of the Complainant by granting the interim relief. Shri Desai, learned Advocate representing the Complainant submitted that the Petitioner has implemented the interim order and the Complainant is still in employment. This fact cannot be ignored. In such circumstances, I hold that no revisional interference is warranted. Accordingly, I answer Point No. 1 in the negative and pass following order.

Order

(*i*) The Revision Application is dismissed.

(*ii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated the 15th November 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

———————

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

REVISION APPLICATION (ULP) Nos. 210 of 1994.—Shri Adinath Bharmu Madnaik, Resident of Madnaik Mala, Jayasingpur, Taluka Shirol, Dist. Kolhapur.—*Petitioner (Respondent of Revn. (ULP) No. 261/94)—Versus*—Shakti Submercible Pumps, 10/1286/19, Ruge Mala, Near Panchavati Chitramandir, Ichalkaranji, Dist. Kolhapur.—*Respondent (Petitioner of Revision (ULP) No. 261/94).*

In the matter of Revision under section 44 of the MRTU & PULP Act, 1971.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri P. B. Lad, Advocate for the Petitioner.

Shri D. S. Joshi, Advocate for the Respondent.

JUDGMENT

1. These Revisions are arising out of judgment and order passed in Complaint (ULP) No. 30/88 by Labour Court, Kolhapur, whereby an employer - Company is directed to reinstate its employee - Winder with continuity of service but without back wages holding that punishment of dismissal is an unfair labour practice under the MRTU & PULP Act.

2. Revision Application (ULP) No. 210 of 1994 is filed by the employee to the extent of refusal of back wages, whereas, Revision Application (ULP) No. 261/94 by the Company to the extent of granting reinstatement with continuity of service.

3. Admittedly, the employee was working as Electric Winder with the Company from the year 1982. The Company served show cause notice dated 6th February 1988 upon him alleging that he was caught red-haded on 6th February 1988 while stealing five plywood pieces from Company's premises and to explain regarding the same. The Company, thereafter, terminated the employee by order dated 7th February 1988 stating that his explanation dated 6th February 1988 is unsatisfactory, offence for theft is serious and cannot be pardoned.

4. The employee then filed above complaint on 7th March 1988 alleging that he put various demands like permanency, bonus, leave benefits, overtime wages, etc. and, therefore, was served with a false show cause notice. It is alleged that the Company Officials forcibly obtained his signatures on some blank papers and illegally terminated him without enquiry. His termination is in violation of provisions of section 25F of the I. D. Act. Finally, he alleged that the company has engaged in unfair labour practices under items 1(*a*), (*b*), (*d*) and (*f*) of Sch. IV of the MRTU & PULP Act and prayed for usual reliefs.

5. The Company filed its written statement at Exh. 14 contending that the Complainant was caught red-handed on 6th February 1988 while committing theft of 5 pieces of plywood, admitted the misconduct/theft in his explanation by praying for mercy and then was legally terminated. It was then contended that the Company be permitted to lead evidence to justify its action if the Court holds that a domestic enquiry was necessary. Finally, the Company prayed for dismissal of the Complaint.

6. Considering rival pleadings, learned Labour Court framed issues at Exh. 21 and the parties went to the trial. The Company produced copies of show cause notice, dismissal order and original explanation (Exh. 39) of the Complainant. It then examined its Partner Shri Narde at Exh. 37 and produced vouchers regarding Complainant's employment with Prakash Auto Engineers, after his termination. The Complainant did not lead oral evidence.

7. Learned Labour Court, on perusal of evidence and hearing both parties, held that the Complainant has admitted the guilt in his explanation dated 6th February 1988 and dis-believed his plea of coerion. It then held that the Complainant was gainfully employed with Prakash Auto Engineers, after his termination. Finally, it held that punishment of dismissal for theft of waste plywood pieces is an unfair labour practice and partly allowed the complaint, as above on 29th February 1994. Said decision is challenged in these Revisions.

8. I heard both Advocates. Considering rival submission, following points arise for my determination :—

(*i*) Whether impugned decision directing reinstatement with continuity of service but without backwages, is justifiable ?

(*ii*) What order ?

9. My findings, on above points, are as under :

(*i*) Yes.

(*ii*) Both Revision Applications are dismissed.

Reasons

10. It needs to be stated at the thrashhold itself that the Company reinstated the Complainant after impugned decision and he is still in the employment.

11. Shri. Joshi, learned Advocate representing the Company argued that the Complainant was reinstated to avoid payment of his wages after decision of the labour Court. However, seriousness of the misconduct/theft cannot be ignored. Theft is neither technical nor a minor misconduct. As such, the labour Court extended misplaced sympathy to the Complainant. He then submitted that the Complainant has nowhere stepped into the witness box to deny his gainful employment with Prakash Auto Engineers. Relevant vouchers produced on record clearly established the gainful employment. In support of his arguments, he relied on the decision in Indian Engineering Works (Bombay) Pvt. Ltd. *Vs.* The Presiding Officer, 5th Labour Court & Others reported in 1995 II CLR at page 890 (Bom. H.C.).

12. Shri Lad, learned Advocate representing the Complainant replied that plywood pieces were worthless. There was no dishonest intention to commit theft and the Complainant has stated accordingly, in his explanation. Besides, his past as well as future record after reinstatement is clean. Therefore, the punishment of dismissal is rightly held to be an unfair labour practice. He further submitted that temporary employment with other concern or earning something for survival cannot be said to be a gainful employment and refusal to pay back wages is an error apparent on the face of the record.

13. Learned Labour Court has recorded a finding of fact that the Complainant has committed misconduct/theft and the same is well justifiable especially for the reason that the Complainant has not stepped into the witness box to prove that his admission was obtained by force. As such, said finding does not warrant revisional interference. It appears that the plywood pieces were worthless. In addition, his past and future record is good. As such, learned labour court has rightly held that punishment of dismissal is an unfair labour practice and well justified in directing reinstatement. As regards, back wages, vouchers of Prakash Auto Engineers show that the Complainant was working on contract basis and earned about Rs. 1200 to Rs. 1500 per month. He has nowhere stepped into the witness box to establishment that his other employment was for his survival. Considering his earning while working with other company, learned labour Court has rightly held that he is not entitled to back wages. Besides, some punishment has to be awarded for proved misconducts/theft. Finally, I hold that learned Labour Court has rightly granted reinstatement without backwages and no interference is called for Accordingly, I answer Point No. 1 in the affirmative and pass following order.

Order

(*i*) Both Revision Applications are dismissed.

(*ii*) A copy of this judgment be kept in other Revision Application.

(*iii*) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
Dated the 14th July 2003.

V. D. PARDESHI,
Asstt. Registrar,
Industrial Court, Kolhapur.

BEFORE THE INDUSTRIAL COURT, MAHARASHTRA AT KOLHAPUR

APPEAL (IC) Nos. 5 to 10 OF 1995.—The Managing Director, Vasantdada Shetkari Sahakari Sakhar Karkhana Ltd., Sangli, District Sangli. *Appellant—Versus*—(1) Shri Dattarao Bhagwan Patil, Sub-Accountant, Liquor, At. Post : Bisur, Tal. Miraj, District : Sangli—Case No. 5/95; (2) Shri Vithal Babaji Patil, Sugar Factory Cuarters, Madhavnagar, Sangli—Case No. 6/95; (3) Shri Shankar Ramchandra Nikam, Sugar Factory Cuarters, Madhavnagar, Sangli—Case No. 7/95; (4) Shri Vilas Tukaram Masale, At Post : Samdoli, Tal. Miraj, District : Sangli—Case No. 8/95; (5) Shri Anna Babu Wakale, Clerk, Sakhar Kamgar Colony, 'E' Type Block No. 1, Room No. 5, Tal. Miraj, Dist. Sangli—Case No. 9/95; (6) Shri Vithhal Abaji Mane, R/o. Kupwad, Tal. Miraj, District : Sangli—Case No. 10/95.—*Respondents.*

In the matter of Appeals u/s. 84 of the Bombay Industrial Relations Act, 1946.

CORAM.—Shri C. A. Jadhav, Member.

Appearances.—Shri A. S. Nevagi, Advocate for the Appellant.

Shri M. B. Kulkarni, Advocate for the Respondents.

JUDGMENT

These Appeals are filed by an Employer Sugar Factory, under section 84 of the Bombay Industrial Relations Act, challenging legality of common order passed in B.I.R. Application (LCS) Nos. 1 to 4, 7 and 10 of 1993 by Labour Court, Sangli holding that domestic enquiry held against present Respondents is contrary to principles of natural justice, and findings of the Enquiry Officer that alleged misconducts are proved, are baseless and perverse and then permitting the Sugar Factory to lead evience to substantiate its action.

2. Admittedly, the Appellant is a Co-operative Sugar Factory, registered under the Maharashtra Co-operative Societies Act. It is engaged in manufacturing sugar and liquor. It is also an admitted position that present Respondents were in employment of the Sugar Factory on various posts. They and one Shri S. B. Awati and other 8 employees were served with separate chargesheets alleging various misconducts. It was mainly alleged that all of them, in collusion with each other committed theft, fraud or dis-honesty in connection with the employers business or property and defrauded the Sugar Factory for an amount of Rs. 28,81,113. The misconducts alleged were in respect of purchasing old empty bottles for Liquor Division of the Sugar Factory. Besides, there were allegations of collusion with each other. As such, domestic enquiries of all 15 employees were conducted jointly and the findings submitted by the Enquiry Officer were also common. The Enquiry Officer held by Report dated 18th December 1992 that charges levelled against present Respondents and Store Keeper Shri S. B. Awati, are proved. He further held that charge of defrauding the Sugar Factory are not proved against other employees but charges of in-subordination and indiscipline are proved against some of them. The Sugar Factory accepted Enquiry Officer's Report and dismissed present Respondents as well as Shri S. B. Awati with effect from 19th January 1993, by separate orders.

3. Present Respondents then filed above Applications under section 78 of the BIR Act challenging their terminations alleging that their terminations are by way of vitctimisation, not in good faith but in the colourable exercise of employer's right and for patently false reasons.

4. The Sugar Factory objected the Applications, vide separate indentical written statements but took identical pleadings.

5. It is case of the Applicants that they served honestly and sincerely and their service record was clean. Even then, false chargesheets were served upon them alleging various misconducts. It is alleged that the Enquiry Officer was appointed without waiting for their explanations. They demanded duty-list and other relevant documents to reply the charges but their request was turned down, for no reasons. They then submitted their explanation denying the charges. Their explanations were legal and proper even then the enquiries were initiated against them. It is further alleged that no proper opportunity to defend themself in the enquiry was given nor the documents which they wanted to rely, were not furnished to them, though demanded. As such, the enquiries are in utter dis-regard of the principles of natural justice and with undue haste. It is also alleged that a common enquiry was made although they were served with separate chargesheets. They further alleged that they were not paid due subsistance allowance and non-payment of subsistance allowance vitiates the enquiry. It is then contended that there was no sufficient evidence before Enquiry Officer to find them guilty. In fact, the Enquiry Officer exceeded his jurisdiction and illegally shifted burden of proof upon them. No exact amount of misappropriation was stated in the

chargesheet. Basides, there was no evidence regarding alleged conspiracy. The Enquiry Officer unnecessarily and illegally framed various issues. the Enquiry Officer acted as a Prosecutor cum Judge. The Enquiry Officer, during the enquiry consistently protected Sugar Factory's Administrative Officer Shri G. V. Patil and thus was bias. It is further contended that findings of the Enquiry Officer are based upon conjunctures and surmises and are totally unlogical. As such, the Report and the findings are baseless and perverse. It is then alleged that their dismissal bases on such perverse findings, are bad in law. Finally, the Applicants prayed for setting aside their dismissal orders, reinstatement with continuity of service and full back wages and other consequential reliefs.

6. The Sugar Factory traversed all material allegations made by the Applicants, contending at the outset that some of the Applicants are not covered by the definition of 'employee' as defined under section 3(*13*) of the BIR Act. It contended that old empty bottles are purchased from various suppliers. It was noticed in April, 1991 that it is being defrauded in purchases thereof. Thereafter, a detailed investigation was made, wherein, it was found that the Sugar Factory is defrauded to the tune of Rs. 28,81,113 and then the Applicants were chargesheeted mainly alleging that they defrauded the Sugar Factory in collussion with each other. The documents demanded by the Applicants were produced in the enquiry. In addition, inspection of various documents was given to them. They were also allowed to be represented by an Advocate and to cross-examine management witnesses. As such, full opportunity was given to them in the enquiry and principles of natural justice were followed. It is then pleaded that the Enquiry Officer has recorded his findings on the basis of evidence adduced before him and those are well justifiable. One third subsistance allowance, as provided under the Certified Standing Orders, is paid to the Applicants and there is no refusal to pay due subsistance allowance. It is also pleaded that the Applicants cannot go beyond the averments in their approach notices and the controvery is restricted to the issues raised therein. The Labour Court cannot sit as an Appellate Court over report and findings of the Enquiry Officer. According to the Sugar Factory, therefore, findings of the Enquiry Officer are legal and proper, proved misconducts were grave and serious and punishment of dismissal is well justifiable. In addition, it is pleaded that if findings of the Enquiry Officer are held to be perverse, then an opportunity be given to lead evidence to substantiate its action. Lastly, the Sugar Factory prayed for dismissal of the Applications.

7. Considering rival pleadings, Learned Labour Court framed issues at Exh. O-3. The Sugar Factory then made an application (Exh. C-9) to hear and decide all applications together. It was allowed.

8. The Applicants produced copies of various documents whereas the Sugar Factory entire enquiry papers, report, Approach Notices of the Applicants and their dismissal orders. Enquiry proceedings and other relevant documents produced by the Sugar Factory are in three volumes and consist of 1667 pages. None of the parties led oral evidence.

9. All Applicants filed separate pursises on 28th September 1993 before the Labour Court, admitting the mechanism of the enquiry and accepting the same to be legal one. Learned Labour Court, therefore, did not frams the issue as to whether the enquiry is in consonance with the principles of natural justice. Learned Advocate representing the Sugar Factory stated before the Labour Court, during his arguments, that the plea that some employees are not covered by the definition of "employee" as defined under section 3(*13*) of the BIR Act, is not pressed. Both parties then filed written arguments and various case-laws in support of their averments.

10. Learned Labour Court, on perusal of evidence produced on record and hearing both parties, held firstly that the enquiry suffers from the principles of natural justice, despite pursises of the Applicants that they do not wish to challenge the legality of the enquiry. I observed that the Applicants have not challenged the legality and validity of the enquiry, it should not opinioned on procedural aspect of the enquiry *i. e.* whether principle of natural justice were followed or not, even then material documents were not provided to the Applicants as well as inspection of some documents was not permitted, and, therefore, there are certain lacunas in the conduct of domestic enquiry.

11. Learned Labour Court, then observed that there may be misappropriation of bottles but there is no material on record to show that it was of Rs. 28,81,113. It then observed that amount of misappropriation is determined on the basis of shortage of bottles but there was no verification of the bottles, by the Sugar Factory, at any time or even by the Auditors, in any financial year. It further observed that, learned Advocate representing Sugar Factory, admitted during his arguments, that there was a procedural failure on the part of the Sugar Factory regarding verification of the bottles. It then held that therefore, benefit of doubts must be given to the weaker section of the Society *i. e.* the Applicants and then concluded that amount of misappropriation determined on the basis of shortage of bottles is baseless and without documentary evidence. It also found that copice of Excise Returns showing consumption of bottles, are perused but the

number of bottles do not tally with the number of bottles shown in the chargesheet. It held that there is no "absolute evidence" to tally the amount of misappropriation with shortage of bottles and, therefore, findings of the Enquiry Officer regarding misappropriation must be held to be baseless and perverse. It also pointed out that the breakage as well as damage is allowed while counting the number of supplied bottles, calculations regarding misappropriation are rough and tentative, there was no physical verification report regarding bottles purchased and, therefore, the very base of the misappropriation is not proved. It then observed that other charges are incidential and hence findings of the Enquiry Officer in respect of other charges, are perverse and beseless.

12. Learned Labour Court has further observed that there must be concrete evidence to prove shortage of bottles and misappropriation and one cannot jump to the conclusion of misappropriation on the basis of amounts paid for purchasing the bottles. In fact, exact number of bottles were never verified and it cannot be accepted that there was shortage of bottles. It further observed that it was very easy for the Sugar Factory to count each and every bottle at the time of purchasing old bottles but the same is not done, and, therefore, now, it cannot be accepted that there is misappropration in purchases thereof. It then held that Excise Returns produced by the Sugar Factory itself, are not at all considered by the Enquiry Officer. It then referred to explanation of the Applicants that the Sugar Factory wanted to save Administrative Officer Shri G. V. Patil and observed that therefore, it was obligatory for the Sugar Factory to enquire in that behalf. But no such action is taken. On the contrary, the Enquiry Officer has exceeded his jurisdiction by framing an issue as to whether Administrative Officer Shri G. V. Patil is involved in the scandal and recorded a negative finding on the same. According to Learned Labour Court, the Enquiry Officer should not have framed issue regarding involvement of the Administrative Officer and exceeded his jurisdiction. It then observed that issue numbers 11 to 13 *i. e.* involvements of the Administrative Officer and victimisation of the Applicants, are totally irrelevant and beyond the scope of enquiry.

13. As regards, legal aspects, Learned Labour Court held that it has powers to decide dispute regarding the propriety or legality of the punishment read with section 11-A of the I. D. Act and provision to that effect, are analogous to each other. It observed that the Court has power to read the entire evidence on record as well as before the Enquiry Officer and see independently as to whether the findings of the Enquiry Officer are based on the evidence adduced before to it. It then held that if a possible view can be taken by the Court, considering the evidence before the Court, it is always open to the Court to do so. It further held that the Enquiry Officer has no jurisdiction to draw adverse inference and drawing of adverse inference is a judicial function. Consequently, it held that no onus of proof can be shifted upon the Applicants and the charges must be proved by possitive evidence and not by circumstantial evidence. It also observed that only statement of management witnesses will not prove the charge but those statements must be supported by possitive evidence. As such, there was no sufficient evidence before the Enquiry Officer even though statements of management's witnesses are not challenged. Finally, it held that findings of the Enquiry Officer are illegal, improper, baseless and perverse and, therefore charges levelled against the Applicants are not proved.

14. Learned Labour Court, then observed that the Sugar Factory has prayed since the beginning to lead evidence to justify its action. Sugar Factory's such plea is not at a belated stage and therefore is entitled to lead 'additional evidence' to justify its action. It then permitted the Sugar Factory to lead the evidence.

15. In the background of above reasoning, learned labour Court passed an order on 21st June, 1995 holding that findings of the Enquiry Officer are beseless and perverse and permitted the Sugar Factory to lead 'additional evidence' to substantiate its action. Said order is challenged in these Appeals.

16. I heard both Advocates at length. In addition, some of the Applicants personaly made some submissions. The Sugar Factory filed synopsis of arguments (Exh. C-7) and relied upon decisions, relied before the Labour Court as well as some other decisions.

17. Now, following points, arise for my determination :—

(*i*) Whether impugned finding/observations that the enquiry, despite admitting the same to be legal and proper by the Applicants, suffers from the principles of natural justice, is sustainable in law ?

(*ii*) Whether impugned decision that findings of the Enquiry Officer are baseless and perverse, is sustainable in law ?

(*iii*) Whether impugned findings of the Enquiry Officer are perverse ?

(*iv*) What order ?

18. My findings, on above points, are as under :—

(*i*) No.

(*ii*) No.

(*iii*) No.

(*iv*) Appeals are partly allowed.

Reasons

19. To appreciate rival pleadings and contentions, it is necessary to state about the posts on which present Respondents - original Applicants were working. It is better to refer them by their names, for the sake of convenience.

20. Shri V. B. Patil was working as Liquor Chemist. Shri S. R. Nikam was working as Assistant Chemist. Shri D. B. Patil was working as Sub-Accountant of Sugar Factory's Liquor Department. Shri Mane and Shri Wakale were working as Clerks in liquor Department and were maintaining material In-ward Registers. Shri Masale was working as Store Clerk in Store of Liquor Department.

21. I must also state that Shri Awati was also working alongwith Shri Masale as a Store Clerk. Shri Awati was found guilty of misconducts alleged against him and then was dismissed on 19th January 1993. He has not challenged his dismissal.

22. It is an admitted position that Shri V. B. Patil Liquor Chemist made report dated 30th April 1991 (Page No. 492 of Enquiry Papers) to Supar Factory's Managing Director regarding less supply bottles than shown in the Supply Note. It was stated that Shriram Sales Corporation has supplied second hand bottles in March and April, 1991 to the Sugar Factory showing load of 270/280 bage of bottles in each truck. However, said two trucks are small and cannot bear load of 270/280 bags of bottles. One such truck was checked on 25th April 1991. It was stated by the Supplier that the same is carrying 265 bags of bottles but on physical verification, 140 bags of bottles were found to be short. Shri V. B. Patil then suspected of fraud in supply of bottles. He also found that Shriram Sales Corporation has purposely shown delivery of bottles during lunch time, acknowledgement of delivery of bottles is not given for two months and Store Clerk Shri S. B. Awati is responsible for the same.

23. Relying upon above report of Shri V. B. Patil Store Clerk Shri S. B. Awati was served with chargesheet dated 7th May 1991 and suspended pending an enquiry. The Sugar Factory then suspended Sub-Accountant Shri D. B. Patil and Inward Clerk Shri Wakale on 29th May 1991 and served chargesheets dated 28th June 1991 and 15th June 1991 respectively upon them.

24. Shri V. B. Patil - Liquor Chemist then made Report Dated 17th July 1991 (page Number 499 of Enquiry papers) that he vertified supply breakage and use of 750 Ml. grams bottles during 1st June 1991 to 15th June 1991 and found that 13,41,112 bottles are deficit.

25. It is an admitted position that Report - dated 30th April 1991 of Shri V. B. Patil was put before the Managing Director alongwith endorsement of Administrative Officer Shri G. B. Patil. The Administrative Officer made another Report dated 11th June 1991 (page No. 468 of Enquiry papers) that he directed Inward Clerk Shri Wakale and Sub-Accountant Shri D. B. Patil that Shriram Sales Corporation and Shriram Trading Company are defrauding the Sugar Factory and carefuly watch Supply of bottles by them. But they illegally cancalled some entries regarding supply of bottles by them and sent back their trucks from Sugar Factory's gate. He further reported that he, on verification of record, has found involvement of these two employees in defrauding the Sugar Factory. The Administrative Officer, as per directions of the Managing Director on his Report dated 11th June 1991, made another report dated 11th July, 1991 (page No. 475) that Shri D. B. Patil, Shri Wakale, Shri Awati and Shri Mane are suspended but there is involvement also of Liquor Chemist Shri V. B. Patil, Assistant Chemist Shri S. R. Nikam and Store Clerk Shri Masale. The Managing Director then Directed to suspend other three employees and to conduct a detailed enquiry. Eventually, Shri V. B. Patil, Shri S. R. Nikam and Shri Masale were served with chargesheets dated 24th July 1991 whereas Shri Mane 29th July 1991 alleging various misconducts. Some of the Applicants were then served with supplimentary chargesheets. Shri V. B. Patil and Shri S. R. Nikam are additionally charged that they were directed not to use bottles out of the disputed stock but malafidely used those bottles despite availability of other bottles. They both have made a Report on 19th June 1991 (page 496) that disputed bottles were used, despite an understanding of not using them because no other bottles were available. The enquiries then proceeded further.

26. The Applicants were permitted to engage Advocates to represent them in the enquiry. The Sugar Factory examined its Administrative Officer Shri G. B. Patil and Checking Officer (तपासणीस) Shri A. S. Patil. It produced all relevant documents in the enquiry. Shri Wakale and Shri Mane then examined Shri Jamadar - Octroi Checker of Sangli Municipal Corporation. Both parties cross-examined witnesses of each other. The Enquiry Officer held that charges levelled against the Applicant and Store Keeper Shri Awati are proved.

27. The Applicants have pleaded in the enquiry that no proper subsistance allowance is paid to them. The Sugar Factory replied that 1/3rd subsistance allowance, as provided in the certified Standing Orders, is paid. The Enquiry Officer has stated that the Applicants filed application before the Assistant Commissioner of Labour regarding payment of subsistance to allowance but proceedings there of were filed by the commissioner on the ground that the same is paid as per Standing Orders. It appears that plea of non-payment of due subsistance allowance and consequential effect thereof on the enquiry is not raised before the Labour Court. It is also not raised before this Court. Even otherwise, there is nothing on record to show that the Applicants were unable to raise their defence on account of non-payment of due subsistance allowance. As such, in my judgment said plea is of no help to the Applicants to allege that the findings of the Enquiry Officer are perverse.

28. Now, turning to powers of Labour Court under section 78(*1*) (*D*) of the BIR Act, learned Labour Court has observed that it has powers to decide a dispute regarding propriety or legality of the punishment read with Section 11-A of the I. D. Act, it can independantly see whether findings of the Enquiry Officer are based on the evidence and it can take a possible view.

29. Shri Nevagi, learned Advocate representing the Sugar Factory submitted that learned Labour Court has exceeded his jurisdiction and made unwarranted observations as if it is exercising jurisdiction under section 11-A of the I. D. Act. He then submitted that a Labour Court cannot Act as an Appellants Court over report of the Enquiry Officer. It cannot substitute its own findings for findings of the Enquiry Officer. It cannot re-asses the evidence and come to a conclusion as to whether findings of the Enquiry Officer recorded upon evidence brought before him, are proper or not. He then pointed out that decision in *S. B. Surve* V/s. *Bombay Municipal Corporation and Ors. reported in 1988 I LLN at page 669 (Bom. H.C.)* was brought to the notice of the Labour Court. The same is referred in the discussions but the observations on legal aspects are contrary to observations of his Lordship.

30. Shri M. B. Kulkarni, learned Advocate representing the Applicants fairly submitted that a Labour Court cannot Act as an Appellate Court but argued that, even then findings of the Enquiry Officer are subjected to judicial scrutiny. He then added that a Labour Court can verifiy as to whether the Enquiry Officer has logically applied its mind and the reasonings are trust-worthy.

31. To appriciate scope of powers of section 78(1)(D) of the BIR Act, it will be profitable for me to refer some of the decisions at the threshold.

32. It is observed in S. K. Surve *V/s.* Bombay Municipal Corporation (referred above) that a Labour Court can grant relief of reinstatement or payment of compensation where it finds that order of dismissal or discharge or the like is improper or illegal but it does not extend, in any way the acope of its jurisdiction and the jurisdiction remains to be governed by clause A of Section 78(*1*). It is then observed that it does not mean that a Labour Court can sit as a Court of Appeal and interfere with findings arrived at by Domestic Tribunal merely because, the Labour Court took a different view of the evidence led before the Domastic Tribunal. It is also made clear that provisions of Section 78 are so clear that no assistance need be taken from any other statute, however akeen to construe them.

33. It is observed in *Sadhana Textiles Pvt. Ltd.* V/s. *Gulabchand Gayadin & Ors. reported in 1993 II-CLR at page 512 (Bom. H. C.)* that power of Courts under section 78(*1*) of the BIR Act are restricted to decide the propriety or legality of the order passed by an employer acting under the Standing Orders, it can only exemine and decide whether the action challenged before it is in accordance with the Standing Order or not and it cannot go beyond it. It is further observed that the scope of the powers of the Industrial Court under section 84 of the BIR Act is coterminous with that of the Labour Court under section 78 of the Act.

34. It is then held in *Municipal Corporation of Greater Bombay* V/s. *General Secretary, Best Worker's Union reported in 1994 I-CLR at page 570 (Bom. High Court)* that a Labour Court under section 78 of the BIR Act is not empowered to interfere with the findings of the Domestic Tribunal simply because it takes a different view of the evidence. Decision in S. K. Surve's case referred above is relied in this decision.

35. It is also held in *Brihan Mumbai Municipal Corporation* V/s. *General Secretary, Best Worker's Union & Ors. reported in 2002 II-CLR at page 835 (Bom.H.C.)* that a Labour Court,in exercise of jurisdiction under section 79 of the BIR Act, has no power to hold that conclusion drawn by the Enquiry Officer ought to have been in a particular manner. Its jurisdiction is neither appellate nor revisional. It is further observed that findings of the Enquiry Officer can be termed as a perverse if a perticular piece of evidence is not considered at all by the Enquiry Officer, while coming to certain conclusion.

36. Considering observations in above decisions, I have no difficulty to say that power of Labour Court under section 78 of the BIR Act are not appellate. It cannot re-assess the evidence and come to a conclusion that findings of the Enquiry Officer ought to have been in a particular manner. However, findings of the Enquiry Officer can be termed as perverse if those are basess and to be instantaneously discarded in a judicia probe. In other words, if the Enquiry Officer has taken a logical, probable and plausible view, then the same cannot be interfered by re-assessing the evidence and cannot be held to be perverse.

37. Observations of learned Labour Court regarding its jurisdiction, in the background of various observations in the decisions referred above, are incorrect. It cannot invoke jurisdiction under section 11 A of the I. D. Act while exercising powers under section 78 of the BIR Act. Likewise, it cannot re-assess the evidence and cannot take or foist another possible view over findings of the Enquiry Officer. It pains me in saying that observations of Learned Labour Court on legal aspects amounts to over exercise of jurisdiction than conferred under section 78 of the BIR Act.

38. Admittedly, all Applicants admitted before the Labour Court that the enquiry is legal. Learned Labour Court, therefore, has observed that issue as to whether the enquiry is legal or proper is not framed.

39. Advocate Shri Nevagi argued that the Applicants admitted the enquiry to be legal and proper and, therefore, the Labour Court had no jurisdiction to hold that the enquiry suffers from principles of natural justice. In fact, the labour Court crossed its judicial limits and innovated a new law of evidence. He further submitted that when the Applicants were satisfied that the enquiry is legal and proper, there was no scope for satisfaction of the Court as to whether the enquiry is legal and proper.

40. I find, on perusal of impugned observations that the enquiry suffers from the principles of natural justice, that the Labour Court was in confusion. Initially, it observed that no issue as to whether enquiry is legal or proper is framed as the Applicants have admitted the enquiry to be legal and proper. It then observed that, even then, the enquiry suffers from the principles of natural justice. These two observations are contrary to each other and do not stand to reason, in the background of specific powers under section 78 of hte BIR Act. It appears that both Advocates argued before learned Labour Court on the issue of perversity of the findings of the Enquiry Officer, wherein, the question as to burden of proof and onus of proof was in controversy. But the Labour Court, while considering those arguments has exceeded his jurisdiction observing that the enquiry suffers from the principles of natural justice. On the contrary, the Applicants were permitted to engage Advocates in the enquiry, to cross-examine management witnesses and to lead defence evidence. Besides, copies of relevant documents were delivered to them. They were also permitted inspection of the some of the documents. In such circumstances, it cannot be accepted that the enquiry suffers from the principles of natural justice. It appears that learned Labour Court has exceeded its jurisdiction and unnecessarily entangled itself in the issue and erred in holding that the enquiry suffers from the principles of natural justice. In fact, when the applicants have admitted mechanism of the enquiry accepting the same to be legal one, issue as to whether the same is contrary to principles of natural justice is no longer in dispute and does not survise. Accordingly, I answer Point No. 1 in the negative.

41. Admittedly, the Applicants and Store Clerk Shri Awati were served with separate chargesheets on separate dates. Accountant Shri D. B. Patil, Inward Register Clerk Shri Wakale and Store Clerk Shri Awati were then served with supplimentary chargesheets. Chargesheets served upon Liquor Chemist Shri V. B. Patil, Assistant Chemist Shri S. R. Nikam and Inward Register Clerk, Shri Mane were corrected regarding dates, months and number of bottles. It is settled law that supplimentary chergesheets can be issued as well as particulars in original chargesheets can be revised or corrected. As such, issuance of supplimentary chargesheets and correction of original chargesheets, is legal.

42. According to the Applicants, a common enquiry was made though they were served with separate chargesheets. The Enquiry Officer has observed that all charges pertain to fraud in collusion with each other in supply of second hand bottles and hence a common enquiry is made with consent of both parties. At the cost of repeatation, I say that the Applicants are nowhere prejudiced although a common enquiry is made. I find an Application (page 157) of Shri V. B. Patil and Shri S. R. Nikam for delivering true copies of their explanations to the chargesheet. It is stated in said application that the enquiries are clubbed and they are in need of requisite documents. As such, common enquiry and a common report is well justifiable. In addition, the management has examined two witnesses and they are cross examined by respective Advocates of the Applicants. As such, both parties were well aware that there will be a common enquiry and are not prejudiced by the same. Eventually, the Enquiry Officer has rightly submitted one Report.

43. Before adverting to material controversy, it is necessary firstly to refer to the procedure of supplying and purchasing the bottles. The same is not disputed by either parties. Liquor Chemist Shri V. B. Patil has stated the procedure in his Report dated 30th April 1991 (page 492).

44. The Sugar Factory publishes rates for supply of second hand bottles and the suppliers supply the bottles at such rate. Suppliers bring loaded trucks at the gate of the Sugar Factory's gate, gets the supply note filled in from concerned clerk of the liquor office entry there of is made in Store-Material Inward Register and then they bring the truck inside. Security Department makes an entry of the truck in the register kept at the main gate as well as on the supply note, while allowing the truck to go inside. The bottles are then unloaded and the Store Clerk issues an acknowledgement to the supplier. Thereafter, on verification, the bills are paid to the supplier.

45. In the process of supplying the bottles payment thereof, supply note is the first document. It containes name of the supplier, details of bottles supplied, Truck number, Octroi Receipt number and its date and signature of the Supplier. Concerned person/Officer of distillary and Liquor Department signs the directions in the Supply Note that the truck be allowed to come inside. Store Material Inaward Register is kept in the office itself. Concerned clerk maintaining said register then writes requisite details from the supply note in said register and then the Security Department allows the truck to come inside. The Store clerk then gets the bottles unloaded and signs receipt voucher about receipt of bottles. There is also a system of maintaining bin-cards whereon all details of receipt of material of every kind and use thereof are to be written. Naturally, it facilitates verification of each kind of material supplied to the Sugar Factory as well as use thereof.

46. It is evident to note that the Sugar Factory did not prepare duty list of the Applicants. However, the Applicants have nowhere denied their signatures on various documents like supply note, material inward register maintained in the office, receipt vouchers and concerned documents. Store Clerk Shri Awati has stated in his explanation dated 9th May 1991 (page No. 80) to the chargesheet that he has given acknowledgment for some trucks only, appologising for the mistake and be pardoned. He then gave written explanation (page No. 83) dated 24th May 1991 that he pointed out less delivery of bottles to higher officers but they directed him to prepers receipt voucher as per the supply note stating that deficit bottles are supplied in the next delivery. He further stated that Applicants and other employees are connected and involved in the entire transaction of supplying the bottles. Assistant Chemist Shri S. R. Nikam has made a report (page No. 490) on 24th July 1991 that there were oral directions of Administrative Officer Shri G. V. Patil, that he and Liquor Chemist should work as Administrative Officer, in addition to their own duties. He has then made clear that it was not advisable that Liquor Chemist Shri V. B. Patil should sign as Administrative Officer as well as on approval slip and, therefore, he was signing concerned documents which were within the power of Liquor Chemist. He admitted that he was signing after verification of papers and Shri Awati was physically verifying the bottles.

47. Considering above circumstances, observations of the Enquiry Officer that there was procedure of issuing oral orders and concerned employees were permitted to sign accordingly, are well justifiable. Consequently, Shri V. B. Patil and Shri S. R. Nikam cannot disown their duties and liabilities.

48. The Sugar Factory has elaborately stated procedure of purchasing bottles duties of each Applicant and their alleged roles in defrauding the Sugar Factory, in respective chargesheets. It is not necessary to reproduce details therein. It is mainly alleged that all of them, in collusion with each other, committed theft, fraud or dishonesty, in connection with employer's business or property and defrauded the Sugar Factory for an amount of Rs. 28,81,113. In addition, it is alleged against Liquor Chemist Shri V. B. Patil and Assistant Chemist Shri S. R. Nikam that they were directed not to use bottles out of the disputed stock but *malafidely* used those bottles despite availablity of other bottles. It is mainly alleged against clerks Shri Wakale and Shri Mane that they made entries in the Store Material Register knowing well that the Sugar Factory is defrauded in supply of bottles. It is mainly alleged against Accountant Shri D. B. Patil that it was his duty to verify all details while making Payment to the suppliers but omitted to do so knowing well about the fraud. It is mainly alleged against Store Clerk Shri Masale that he did not properly maintained record about supply of bottles knowing well that requisite number of bottles are not supplied and the Sugar Factory is defrauded in supply thereof.

49. Liquor Chemist Shri V. B. Patil and Assistant Chemist Shri S. R. Nikam denied the charges, *inter alia*, contending that they have simply counter signed the payments to be made to the suppliers, was not duty bound to physically inspect those bottles, but are victimised to save Administrative Officer Shri G. V. Patil. Clerks, Shri Wakale and Shri Mane too have taken identical pleas. They contended that they were not dutybound to physically verify the bottles. Accountant Shri D. B. Patil has taken a plea of total denial. Defence of Store Clerk Shri Masale is identical like other Applicants.

50. Now, turning to Report of the Enquiry Officer, he has framed 13 issues. He has observed that no evidence was led by the Applicants in support of their plea of victimisation. He has rightly noted that the Applicants have not come with a case that there is no misappropriation at all and such is not their defence. The Sugar Factory, during the enquiry, brought identical Truck (MHL-2005) like the Truck (MHL-646) through which bottles were delivered and a demonstration was made regarding number of bage which can be loaded in the Truck. It was found that the identical truck can carry load of 140 bags only and not 260/270 as stated in the supply note. None of the Applicants, during the enquiry, objected to the demonstration.

51. The Enquiry Officer, then found by relying upon Report dated 17th July, 1991 of Liquor chemist Shri V. B. Patil and another Report (Page 507) of checking officer Shri Patil as well as other documents that the Sugar factory is defrauded for an amount of Rs. 28,81,113 by showing excess delivery of the bottles.

52. The Enquiry Officer has further observed that it was duty of the Clerks Shri Wakale and Shri Mane while making entries in Store Material Inward Register, to verify details about payment of Octroi as those are to be written on the Supply Note as well as in the Register. Accordingly, they verified Octroi details and were aware of the number of bottles supplied but did not enter actual number of bottles. According to the Enquiry Officer, therefore, they both were aware of actual number of bottles delivered but purposely did not enter proper details in the register as were involved in the fraud. Otherwise, there was no propriety for not entering actual number of bottles which came to their notice on perusal of Octroi Details. He then held Shri Masale and Shri Mane guilty of the misconducts.

53. The Enquiry Officer has further found that Reports dated 11th June 1991, 18th June 1991 and 18th July 1991 made by Administrative Officer Shri G. V. Patil speaks of involvement of the Applicants in defrauding the Sugar Factory, those Reports are well justifiable and no-where challenged by the Applicants. He observed that it requires period of about three hours for unloading bottles from the truck but timings of the trucks are incorrect. Same truck (MHL-2931) carrying bottles from Pune has made two trips on 26th February 1991 at 12 noon as well as 4.30 p. m. which is practically impossible. There are no corresponding entries regarding Octroi details on material inward register regarding delivery of bottles on 6th March 1991 and those facts are self-eloquent. I must state that the Enquiry Officer has referred all minute details and inconsistancies in Sugar Factory's record regarding counter-checks. It is not necessary to refer each and every entry thereof.

54. The Enquiry Officer has also observed that all Applicants are not chargesheeted simultaneously but are chargesheeted as and when their involvement was noticed during inspection of the fraud. According to him, such facts reflect *bonafides* of the Sugar Factory. He has then observed that the sugar factory was initially unaware regarding involvement of Liquor Chemist Shri V. B. Patil and Assistant Chemist Shri S. R. Nikam, however, they used bottles out of the disputed stock despite directions not to use those bottles and then noticed their involvement. He then believed reports of Administrative Officer Shri G. V. Patil and his version in the enquiry.

55. The Enquiry Officer has then, considering procedure of supply bottles and payment thereof and role of the Applicants as well as Shri Awati, held that there cannot be individual fraud or misappropriation but it has to be in collusion with each other as well as outcome of conspiracy. He then held that responsibility of Shri V. B. Patil and Shri S. R. Nikam was co-extensive regarding delivery of bottles as stated in the Supply Note. They were aware about the actual bottles used as were signing Excise Returns, were aware about the actual bottles delivered and used but approved the payments. As such, they are involved in defrauding the Sugar Factory. He dis-believed their plea that they signed Supply Notes in due course and only as a procedure. He found that Shri V. B. Patil himself made a Report on 30th April 1991 that 270/280 bage of bottles cannot be loaded in the two trucks and, therefore, cannot now say that he was unaware of the loading capacity. The Enquiry Officer further found that use of disputed bottles by Shri V. B. Patil and Shri S. R. Nikam despite directions not to use those bottles, speaks voluminously. He found that bottles are delivered from time to time between the period 30th April 1991 to 19th June 1991 and hence explanation that the bottles were not available, is unjustified. On the contrary, use thereof, amounts to screening the evidence. He then found involvement of Sub-Accountant Shri D. B. Patil, on same grounds.

56. Applicant Shri Masale was maintaining bin-cards (Stock register) and working and discharging equal duties like of Store Clerk Shri Awati. Details of material supplied are firstly entered in Store Material Inward Register and then on the bin-cards. The Enquiry Officer found that no entries are made in bin-cards after 15th February 1991, but false bin-card numbers are stated in material ident Register and, therefore, there is involvement of Shri Masale and Shri Awati. Otherwise, there was no propriety for not entering requisite details and not keeping entire record up to-date.

57. Applicants, Shri Wakale and Shri Mane have examined Shri Jamadar, Octroi Checker of Sangli Municipal Corporation. It has come in his cross examination that octroi is assessed on physical verification of material imported. The Enquiry Officer, therefore dis-believed beleted plea of the two employees that less octroi was paid and the Sugar Factory is not defrauded. He then observed that report of Liquor Chemist speaks of fraud and therefore, onus to prove that less octroi was paid shifts upon the Applicants but the same is not discharged by them.

58. The Enquiry Officer finally held that all Applicants and Shri S. B. Awati are involved in defrauding the Sugar Factory in supply of second-hand bottles and misconducts alleged against them are proved. He held that the Applicants were aware of the fraud by less supply of bottles but, in collusion with each other, defrauded the Sugar Factory and there is no victimisation. He also held that there is no involvement of Administrative Officer, Shri G. V. Patil and the Liquor Chemist and Assistant Chemist intentionally disobeyed directions of the Superiors by using disputed bottles.

59. Shri Nevagi, learned Advocate representing the Sugar Factory argued that observations and reasonings of learned Labour Court are not like an Adjudicator but of a Crusader fighting for the cause of the Applicants. A Labour Court cannot Act as an Appellate Court while exercising powers under section 78 of the BIR Act. Even then, it reassessed the evidence and that too one sided. The standard of proof in a domestic enquiry is of proponderance of probabilities and not like of a criminal trial *i. e.* beyond reasonable doubt. But the Labour Court has imported a concepts like benefit of doubt, abolute evidence and concrete evidence while commenting upon findings of the Enquiry Officer. He further pointed out that burden lies upon the Applicant to prove their plea of victimisation, no evidence was adduced by them to discharge the burden and, therefore, the Enquiry Officer has rightly disbelived the plea of victimisation. Findings of the Enquiry Officer are well supported by evidence and it was beyond jurisdiction of the Labour Court to hold that it can independantly read the entire evidence and can take a possible view. He further submitted that arguments were made before the Labour Court that the Applicants took benefits of procedure in purchasing the bottles and it was never stated that there was a procedural failure by the Sugar Factory. He then pointed out that none of the Applicants have stated in the explanation to the chargesheets that Sugar Factory is not defrauded. As such, observations of the Labour Court that there may be a misappropriation but there is no documentary evidence regarding misappropriation to the tune of Rs. 28,81,113 are totally incorrect. He then argued that all other defences after thought. He then pointed out that findings of the Enquiry Officer can be held to be perverse if those are without evidence or contrary to law. The Liquor Chemist himself made a Report regarding less supply of bottles and misappropriation thereof. A demonstration was made to verify as to how many bags of bottles can be loaded in the trucks used for supply of bottles but none of the employees were present at that time, despite advance notice. The Enquiry Officer has considered each and every minute details and has recorded justifiable and legal finding holding the Applicants guilty of the misconducts. He predominently argued in terms of reasoning of the Enquiry Officer.

60. Shri M. B. Kulkarni, learned Advocate representing the Applicants countered above arguments and replied that legality or formality of the enquiry is immaterial, however, basic principle under the Indian Evidence Act are applicable to domestic enquiry. The Labour Court has jurisdiction under section 78 of the BIR Act to verify trustworthiness of reasonings of the Enquiry Officer and over all logical application of mind. There are allegtions of conspiracy and the Sugar Factory has basically relied upon circumstantial evidence. As such, the circumstantial evidence must be so strong or trustworthy that conclusion of conspiracy must be irresistible. There is material difference between the proof of a misconduct and probabillty of misconduct and it has to be borne in mind while appreciating findings of the Enquiry Officer. Independent culpability of each Applicant is not proved and it is an error apparent on the face of the record. Observations of the Enquiry Officer are like an investigator and not as an Adjudicator. In fact, the Enquiry Officer has proceeded on the assumption that reports of the Administrative Officer Shri G. V. Patil are correct. The Enquiry Officer has viewed all facts from the spectacled of an Investigating Officer. As such, his Report and the findings are without evidence.

61. Shri Kulkarni, further submitted that the coolies and one peon of the Sugar Factory are exonerated from the charges of misappropriation on the ground that they have not played material role. However, same logic is not applied to the Applicants and it is an error apparent on the face of the record. Signatures of the Applicants on respective documents do not prove their involvements in alleged fraud. In fact, role of Store Keeper Shri Awati was material as he is the only person to note particulars of bags of bottles actually delivered by the suppliers. Octroi details are held to be conclusive proof of the misappropriation. Convenient or favourable portion from expalnation of Shri Awati is carved out and used against the Applicants by conveniently ignoring other particulars therein. Higher Officers or seniors cannot be held responsible for mistakes of junior. Knowledge of misappropriation or delivery of less bottles can be at the point/stage of unloading only and cannot be stretched to cover all other employees/Applicants.

62. To appreciate rival arguments, it is necessary firstly to refer to observations and reasonings of impugned order.

63. Learned Labour Court has observed that benefit of doubt regarding Sugar Factory's failure to physically verify the bottles in stock, must be given to weaker section of the Society *i. e.* the Applicants and determination of misappropriated amount is baseless. However, it has simultaneously observed that there may be misappropriation and it is not a case of no misappropriation at all. In my judgment, principles of criminal jurisprudence such as giving benefit of doubt etc., cannot be imported into industrial jurisprudence.

64. It is held in *Gajanan S. Thakare* V/s. *Maharashtra State Road Transport Corporation reported in 2000-III-CLR at page 99(Bom. H. C.)* that yardstick applied in criminal cases cannot be applied in domestic enquiry. As such, observation of learned Labour Court that there was no physical verification of bottles, each and every bottle ought to have been counted and hence misappropriation is not proved, are totally unsustainable in law. Concept of 'benefit of doubt' as enunciated in criminal jurisprudence cannot be unduly stretched and benefit of doubt must be given in commensurate to the offence alleged and invetigated. In the present case, it was practically impossible for the Sugar Factory to check each and every bottle for determining exact numbers of bottles which were not supplied but shown in the supply notes. Many bottles could have been broken. In such circumstances, resorting to rule of approximation and obtaining report thereof from Checking Officer Shri A. S. Patil on the basis of number of bags, is well justifiable. The standard of proof required to be applied in domestic enquiry is of preponderance of probabilities As such, observations of learned labour Court that there must be absolute and concrete evidence and circumstantial evidence cannot prove the charges, are clearly erroneous. Probability mean the likelihood of anything to be true as inferred from knowledge and observations. The circumstantial evidence mean the evidence of connected circumstances which make probable that particular incident would have happened. In a given case, in absence of direct evidence, the Enquiry Officer can decide the case on the basis of circumstantial evidence. It is observed in *S. K. Awasti* V/s. *M. R. Bhope Presiding Officer, First Labour Court and Others reported in 1994 I-CLR at page 254 (Bom. H. C.)* that Indian Evidence Act is not applicable to the evidence led in domestic enquiry and even hear-say evidence is admissible. All materials which are logically probative for a prudent mind, can be produced in the enquiry.

65. Further observations of learned Labour Court that the Enquiry Officer exceeded his jurisdiction by framing issue regarding involvement of Administrative Officer Shri G. V. Patil, are also unsustainable. It is defence of the Applicants that they are victimised to save Administrative Officer. As such, the Enquiry Officer cannot be faulted for framing said issue as well as issue of victimisation of the Applicants. It is elementary principles of Industrial Jurisprudence that burden lies upon employee to establish victimisation after employer discharges his burden of proving the misconducts. As such, the Enquiry Officer has rightly framed the issue of victimisation.

66. Same is the case regarding observations of learned Labour Court on legal aspects. Observations that it can independently read entire evidence, take a possible view and consider propriety or legality of punishment read with Section 11-A of the I. D. Act or totally contrary to the observations in S. B. Surve *V/s.* Bombay Municipal Corporation and others (referred above).

67. The Labour Court has done precisely what it could not have done. It has assumed appellate jurisdiction, re-assessed the evidence and that too partly as if it is trying a criminal case, wherein the Sugar Factory has to prove the exact amount of misappropriation. It imported principles of criminal jurisprudence into industrial jurisprudence without appreciating fundamentaly different roles played by the two. It totally ignored the standard of proof required to be applied in a domestic enquiry and that too perversely. In fact, it is nowhere denied by the Applicants in their explanations that there is no fraud at all. Those explanations cannot be ignored and now it cannot be accepted that there is no misappropriation at all.

68. In the background of above discussions, I am satisfied that impugned order of learned Labour Court that findings of the Enquiry Officer are baseless and perverse, is unsustainable in law. Accordingly, I answer Point No. 2 in the negative.

69. To appreciate rival arguments on findings of the Enquiry Officer, it is necesary firstly to consider the standard of proof required in a domestic enquiry.

70. It is observed by Hon'ble Apex Court in *State of Haryana and Anr.* V/s. *Ratan Singh reported in 1977 Lab. I. C. at page 845,* as under :—

> "It is well settled that in a domestic enquiry the strict and sophisticated rules of evidence under the Indian Evidence Act may not apply. All materials which are logically probative for a prudent mind are parmissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. It is true that departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Indian Evidence. The essence of judicial approach is objectivity exclusion of extrancous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiates the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good."

71. It is clearly held in *Nand-Kishor Prasad* V/s. *State of Bihar & Anr. reported in 1978 Lab. I. C. at page 1106 (S. C.).,* as under :—

> "Disciplinary proceedings before domestic tribunal are of a quasi-judicial charactor, therefore, the minimum requirement of the rules of natural justice is that the tribunal should arrive at its conclusion on the basis of some evidence. *i. e.* evidential material which with some degree of definitness point to the guilt of the delinquent in respect of the charges against him. Suspcion cannot be allowed to take the place of proof even in domestic inquiries."

72. As regards hearsay evidence, observations of Hon'ble Apex Court in *J. D. Jain* V/s. *Management of State Bank of India, reported in AIR 1982 SC at page 673,* are material. It is held as under :—

> " The Tribunal has committed an error in holding that the finding of the domestic enquiry was based on "hearsay" evidence. The law is well settled that the strict rules of evidence are not applicable in a domestic enquiry. The word "hearsay" is used in various senses. Some times it means whatever a person is heard to say. Sometimes, it means whatever as person declares on information given by someoneelse. For the purpose of a departmental enquiry, complaint, certainly not frivolous, but substantiated by circumstantial evidence, is enough."

73. It is well settled that if the domestic enquiry is fair, the findings recorded by the Enquiry Officer cannot be succesfuly challenged unless it is shown that the findings are perverse in the sense that they are not based on any evidence at all. Such observations are made by Hon'ble Apex Court in *Management of Travancore Titanium Products Ltd. Trivandrum* V/s. *Their Workmen reported in Supreme Court Labour Volume 5. at page 53.* It is also observed by Hon'ble Apex Court in *M/s. Banaras Electric Light & Power Co. Ltd.* V/s. *Labour Court, II, Lucknow & Anr. reported in Supreme Court Labour Judgements Vol. 5 at page 66,* as under :—

> "An Industrial Tribunal would not be justified in characterising the finding recorded in the domestic inquiry as perverse unless it can be shown that such a finding is not supported by any evidence, or is entirely opposed to the whole body of the evidence adduced before it. In a domestic enquiry once a conclusion is deduced from the evidence, it is not permissible to assail that conclusion even though it is possible for some other authority to arrive at a different conclusion on the same evidence. There is also no rule of evidence which lays done that the evidence of a solitary witness cannot be relied upon or merely because there is only a solitary witness in support of the charge, no conclusion can be based upon it even though the evidence of that witness is acceptable as true."

74. Considering observations in above decisions, in my humble opinion, findings of the Enquiry Officer can be held to be perverse if are altogether against the evidence in the sense, if are contrary to law. Rival contentions need to be considered by keeping such legal proposition in mind.

75. Admittedly, Liquor Chemist Shri V. B. Patil made report dated 30th April 1991 regarding less supply of bottles than shown in the Supply Note. He suspected fraud in supply of bottles. He then made another report dated 17th July 1991 that 13,41,112 bottles are deficit. He has given credit of 5 per cent for breakage. These two Reports are not challenged by any of the Applicants. Their explanations which hold a prime position in the enquiry, do not say that there is no misappropriation at all. Their bone of contention is that they are not concerned in the transactions.

76. Advocate Shri Kulkarni took me through Report of the Enquiry Officer and canvassed that the Enquiry Officer has presumed stock of 2,36,839 bottles as on 1st April 1990. In fact, there was no evidence before him to fix said number as there was no physical verfication of the stock and, therefore, further conclusion are without any foundation. He then pointed out that Checking Officer Shri A. S. Patil has prepared the Report presuming the figure as on 1st April 1990, as correct and that too on the basis of number of bags. According to him, therefore, figure of alleged deficit hottles is baseless and charge of misappropriation fails.

77. At the cost of repeatation, I say that strict and sophesticated rules of evidence under Indian Evidence Act are inapplicable in a domestic enquiry and materials which are logically probative, for a prudent mind, are permiasible. Liquor Chemist Shri V. B. Patil himself made a report on 17th July 1991 that 13,41,112 bottles are deficit. The same is not disputed by him as well as other Applicants. As such, now they are astopped from challenging correctness thereof. In addition, there is report of Checking Officer Shri A. S. Patil. He, relying upon report of liquor Chemist Shri V. B. Patil, has drawn the figure of deficit bottles. The Sugar Factory has also solicited details of the price of the bottles shown while paying octroi. It was practically impossible to check each and every bottle. In such circumstances, determining the number of bottles supplied on the basis of number of bags is well justifiable and cannot be faulted. I must state that no burden lies upon the Sugar Factory to prove the misappropriation beyond reasonable doubt but it is to be proved by way of preponderence of probabilities. It appears that amount of misappropriation is calculated on the besis of bills of suppliers and price thereof shown while paying the octroi. As such, arguments of Advocate Shri Kulkarni need to be repelled. The Enquiry Officer has properly relied upon the evidence brought before him and has recorded a justifiable finding regarding the misappropriation.

78. Admittedly, the Sugar Factory during the enquiry, made demonstrations regarding number of bags which can be loaded in a similar or like truck. The 'Panchanama' thereof was made on 26th September 1992 (page 1124). It shows that none of the Applicants were present at that time. It was found that only 139 bags of bottles could be loaded in said truck.

79. Shri Kulkarni argued that the Enquiry Officer exceeded his jurisdiction in permitting the Sugar Factory to have the demonstration as well as having such demonatration. As such, said aspect will have to be ignored at all. I am unable to appreciate such plea of Advocate Shri Kulkarni. The Applicants are nowhere prejudiced by the demonstrations. On the contrary, it was a *bonafide* action on Sugar Factory's part to further establish that no requisite number of bags can be loaded in the trucks which supplied the bottles. It was found during the demonstration that only 139 bags could be loaded. Such mode of evidence is permissible considering the standard of proof required to be applied in a domestic enquiry. As such, the Sugar Factory cannot be faulted for resorting to the demonstration and thereby establishing the fraud. Consequently, it cannot be accepted that the enquiry Officer performed role of an investigator.

80. It was then argued by Advocate Shri Kulkarni that observations of the Enquiry Officer that same truck cannot twicely deliver bottles from Pune in one day, is a outcome of conjunctures and surmises. He explained that the Suppliers have depots in the vicinity or nearby places like Kupwad, Miraj etc. and delivery by same truck in one day, is possible.

81. Advocate Shri Nevagi replied that the Sugar Factory has discharged its burden by pointing out various illegalities and, therefore, onus to prove that the supplier's had depots in nearby places, shifts upon the Applicants.

82. I must repeat that the Applicants have not come with a case that there is no misappropriation at all and the number of bottles shown in the Supply Notes are totally supplied to the Sugar Factory. Even otherwise, Report dated 17th July 1991 by Liquor Chemist Shri V. B. Patil falsify their version. As such, I am unable to subscribe arguments of learned Advocate Shri Kulkarni.

83. Advocate Shri Nevagi then submitted that Shri Mane and Shri Wakale were maintaining Material Inward Register kept in office of Liquor Department. They used to fill in the Supply Notes. While filling the supply notes, it was their obligation to verify octroi details. The octroi receipt is shown to them by the Supplier. They verified octroi details and price shown therein. Even then, they entered more amount than the price stated in the octroi receipt. Their such conduct is self-eloquent. Thereafter, the papers were put before Liquor Chemist Shri V. B. Patil and Assistant Chemist Shri S. R. Nikam for permission to bring the truck inside. While according permission, it was their duty to check amounts shown in the Supply Notes and shown in the octroi receipt. They cannot disown their duties simply saying that they signed the supply notes as a part of procedure. In addition, they were incharge of entire Liquor Department and have signed concerned registers in such capacity. They were aware about the number of bottles utilised as were signing excise returns. As such, findings of the Enquiry Officer that they signed the supply notes knowing well that less number of bottles supplied than shown in the supply note, cannot be branded as perverse and contrary to law.

84. Advocate Shri Kulkarni, reiterated that signatures of concerned Applicants on the Supply Notes as well as entries thereof in Matarial Inward Register cannot automatically establish their knowledge or involvement. The Enquiry Officer has stretched his imagination by holding them guilty.

85. In my judgment, there is a propriety for furnishing octroi details in the Supply Notes. The obvious reason is to have details thereof on record. Concerned Applicants while filling requisite details in the Supply Note or verifying correctness thereof, must examine all details thoroughly. They were expected to be honest and faithful being an implied service-condition. It is seen that they have conveniently ignored octroi details despite presentation of octroi receipt by concerned suppliers. Their such conduct is self-eloquent and speaks voluminously. They have entered more amounts than shown in the octroi receipts as well as conveniently ignored the inconsistancies in both amounts. In such circumstances, the logical inference considering the principles of preponderence of probabilities, which can be drawn is that they were well aware of less supply of bottles. In other words, their culpable omission is well indicative of their involvement in defrauding the sugar factory. Otherwise, there was no propriety for them is not entering actual number of bottles which came to their notice on perusal of octroi receipts.

86. Liquor Chemist Shri V. B. Patil personally submitted that he wrongly put his signature on Supply Note (page 597) in place of signture of the Supplier but immediately cancelled the same and signed as an Administrative Officer. According to him, signing a Supply notes merely permits truck's entry and nothing more. Any available or responsible person used to sign the Supply Notes. Such procedure is followed since beginning and the octroi has no concern with the factory. In fact, he is the person who made investigation and submitted report dated 30th April 1991 suspecting she fraud. Even then, he is chargesheeted by protecting Administrative Officer Shri G. V. Patil. He further submitted that his main job was of preparing various kinds of Liquors, was not expected to verify unloading of the bottles and entire work of unloading and storage of bottles was with concerned clerk Shri Awati. He then took me through cross-examination of Administrative Officer Shri G. V. Patil (page Nos. 391 and 392) and pointed that many other employees have signed on behalf of Administrative and Strore Clerk is the only employee who attends the unloading. He further pointed out that the Administrative Officer has signed supply note dated 13th February, 1991 (page 545) but is not served with chargesheet. Finally, he submitted that he has not committed any misconducts and the Enquiry Officer has favoured the Administrative Officer by illegally giving a clean chit to him.

87. Clerk Shri Wakale personally submitted that he was transferred to concerned table on 15th February 1991. He and another clerk Shri Mane were maintaining material inward register and entire details of supply notes therein. He then submitted that Sugar Factory's resolution dated 22nd March 1991 (page No. 1533) says that liability to pay octroi is of supplier and it is not stated that octroi details should be stated in the supply note. He further made similar submission like made by Liquor Chemist Shri V. B. Patil.

88. Advocate Shri Kulkarni further argued that Shri V. B. Patil and Shri S. R. Nikam have signed Store Registers but that does not mean that they are answerable to entires therein as none of them were admittedly present when the bottles were actually unloaded, except Store Clerk Shri Awati. Findings regarding involvement of clerk Shri Masale (page Nos. 1606 to 1608) are based on conjunctures and surmises and there is no discussion in the Report regarding cross-examination of management witnesses. Absence of all Applicants at the time of actual unloading of bottles is admitted and it is nowhere explained as to how defence is false. There is no uniformity in the reasoning and those are well culpable.

89. It cannot be disputed that the Enquiry Officer is not bound to strictly follow the procedure provided for trial of matters in Courts and is a quasi judicial authority. As such, Enquiry Officer's report has to be considered keeping such proposition of law in mine. In other words, preciseness and or conciseness cannot be expected in orders of the Enquiry Officer but the sum and subsistance there of is material.

90. It is interesting to note that none of the Applicants have come with a case that octroi receipts were not shown to them while preparing supply notes, nor is their case that they did not verify octroi receipts when the supply notes were prepared. It has come in cross-examination of Octroi Checkers Shri Jamadar (examined as defence witness by Shri Wakale and Shri Mane) that octroi is assessed on actual verification of goods imported. Liquor Chemist Shri V. B. Patil himself has reported that the trucks cannot bear load of 270 to 280 bags of bottles, one truck was checked on 25th April 1991 and 140 bags of bottles were found short. It is not in dispute that they have signed supply notes, from time to time on behalf of Administrative Officer as well as approved payments thereof. The Enquiry Officer, on perusal of evidence brought before him has noted various illegalities and found that less bottles were supplied than shown in the supply notes. Reasonings thereof are well justified and cannot be branded as perverse or contrary to law. He has noted various details and has come to a proper conclusion that the sugar factory is defrauded in supply of bottles. It is not necessary to refer entire reasoning as jurisdiction of this Court under section 84 of the BIR Act is conterminous with that of the Labour Court under section 78 of the Act and the Labour Court cannot Act as an Appellate Court over report of the Enquiry Officer. It is sufficient to say that reasoning of the Enquiry Officer while holding that the sugar factory is defrauded warrants no interference. Material inaward Register maintained by Clerk Shri Mane and Wakale contain a column of octroi details. Accordingly they have filled in said column of octroi details on perusal of octroi receipts. Consequently, they were well aware about the price of bottles imported. Checking Inspector has made clear that octroi is assed on verification of material imported. As such, they were well aware of all the details. Even then, they have entered more amounts. As such, inference of their involvement and collusion in defrauding the sugar factory is well justifiable and cannot be held to be perverse. It cannot be excepted that they were blindly making entries in material inward register.

91. It is not in dispute that the Supply note is then sent to Administrative Officer for directions to Security Department to allow the truck to come inside. Admittedly, Liquor Chemist Shri V. B. Patil, Sub-Accountant Shri D. B. Patil, Clerks Shri Wakale and Mane have signed as Administrative Officer by directing the Security Department to take the trucks inside. The Enquiry Officer has annexed chart to his report showing all particulars. It is also an admitted position that Liquor Chemist Shri V. B. Patil and Assistant Chemist Shri S. R. Nikam have approved the payments. Naturally, it was their obligation to verify prior to the approval that requisite bottles are delivered. It is own report of Liquor Chemist Shri V. B. Patil that there was fraud of bottles. Even then he instructed the Security Department to allow the truck to come inside and then approved the payment. As such, now he cannot say that he was unaware of shortage of bottles. Same reasoning is Applicable to Assistant Chemist Shri S. R. Nikam, who has approved the payment without verifying the details. Duty of approving the payment, cannot be said to be a formality and it cannot be expected that the approval should be as a matter of routine. In addition, expalnation of Shri Awati (page No. 83) corborates involvements of Shri V. B. Patil, S. R. Nikam and Shri D. B. Patil. Strict rules under the Indian Evidence Act are in applicable in a domestic enquiry and hence explanation of Shri Awati can be used as a corborative evidence. As such, findings of the Enquiry Officer that Shri V. B. Patil, Shri S. R. Nikam, Shri D. B. Patil and Clerks Shri Wakale and Shri Mane were involved in defrauding the Sugar Factory, cannot be faulted.

92. Clerk Shri Masale has stated in his explanation (page No. 122) that he is unaware of the fraud, if any, and has no nexus with the same. It was his duty to maintain bin-cards (stock register). However, he has made no entries therein from 15th February 1991 onwards. He was keeping indents and maintaining record about delivery of the material. The Enquiry Officer found that bin-cards number are written by him on store material indent register but no corresponding entries are made on bin-cards. As such, false bin-cards numbers are entered in Material Indent Register. In addition, on entries are made from 6th April 1991 onwards in material Indent Register. According to Enquiry Officer, therefore, such conduct of Shri Masale speaks of his involvement in the fraud.

93. There is no satisfactory expalnation by Shri Masale about his such omission. He has signed goods receipt Nos. 404 and 405. Checking Officer Shri A. S. Patil has found that no entries are made in Store Register regarding arrival of material and use thereof as per the indents as well as no entries are made on bin-cards. There is no satisfactory expalnation by Shri Masale about his such omission. The logical reason thereof that he was aware of the fraud and did not make proper entries as no bottles as stated in the supply notes were delivered. As such, observations of the Enquiry Officer regarding involvement of Shri Masale are well justifiable.

94. As regards, alleged involvement of Administrative Officer Shri G. V. Patil, it needs to be stated that the Applicants are chargesheeted regarding misappropriation during the period 15th February 1991 to 30th April 1991. Admittedly, Shri G. V. Patil has neither signed any of the supply Notes nor approved payment thereof during such period. Assistant Chemist Shri S. R. Nikam has made report on 24th July 1991 (page No. 490) that the Administrative Officer was promoted in February, 1991 and, therefore, he and Liquor Chemist Shri V. B. Patil were working as Administrative Officer in addition to their own duties. As such, it cannot be accepted that the Administrative Officer was involved in defrauding the sugar factory during the relevant period. No doubt, he has signed supply note dated 13th February 1991 (page 545) but it is beyond the period of fraud stated in the chargesheets. Consequently, the Administrative Officer cannot be said to be involved in the fraud during the requisite period. In any case, his alleged involvement cannot exonerate the Applicants from the proved misconducts. Consequently, findings of the Enquiry Officer exonerating the Administrative Officer cannot be faulted.

95. Shri V. B. Patil and Shri S. R. Nikam are additionally chargesheeted that they used bottles out of disputed stock despite directions of not using them.

96. Shri V. B. Patil personally submitted that he personally verified the bottles, if any, in the stock other than the disputed one. No bottles were available for 2/3 months and there was no alternate than to utilise disputed bottles. Accordingly, he has made report dated 19th June 1991 (page No. 496).

97. Advocate Shri Nevagi, submitted that Shri V. B. Patil and Shri S. R. Nikam ought to have sought previous permission of higher authorities while using the disputed bottles. Burden lies upon them to prove that no bottles were available at that time. The bottles were purchased from time to time during the intervening period. As such, said misconduct is proved.

98. In my judgment, burden shifts upon Shri V. B. Patil and Shri S. R. Nikam to justify their action. The report is not a substitute for their justification. However, they have not discharged their burden. In such circumstances findings of the Enquiry Officer to that effect cannot be said to be perverse. Material Inward Register shows that bottles of various quantities are supplied after 26th April 1991.

99. To summarise, Learned Labour Court assumed Appellate jurisdiction, re-appreciated the evidence as if it is trying a criminal case and imported principles of criminal juris-prudence into industrial juris-prudence by totally ignoring standard of proof required to be applied in a domestic enquiry and that too perversely. The Applicants have nowhere denied the procedure regarding supply of bottles and payment thereof as well as their signatures on various documents. There was procedure of issuing oral orders and they were permitted to sign accordingly. As such, they cannot dis-own their duties and liabilities. Store Clerk Shri Awati was present while the bags of bottles were being unloaded. Even then, he signed the vouchers showing more delivery of bottles than actually delivered. Liquor Chemist Shri V. B. Patil is bound by his report and number of bottles found short by him. Now, he cannot dis-own or challenge the contents thereof. His report is not disputed or denied by other Applicants. They, except clerk Shri Masale, have signed the Supply notes though found on verification of octroi receipts that less number of bottles are supplied then shown therein. The payments are approved by Shri V. B. Patil and Shri S. R. Nikam. They ought to have verified all details, prior to the approval. Their such culpable omissions are well indicative of their involvement in defrauding the sugar factory. Their Acts of signing as Administrative Officer and approving the payment cannot be said to be routine one. Their signatures in such capacity show that they perused all details and then made signatures. The standard of proof required to be applied in a domestic enquiry is by way of preponderence of probabilities and not beyond reasonable doubt. Considering totality of all circumstances, findings of the Enquiry Officer regarding their involvement cannot be said to be perverse or without evidence. The Enquiry Officer has perused relevant documents while recording his findings. He has given congent reasons for accepting evidence and disbelieving defence of the Applicants. I,

therefore, hold that Learned Labour Court has committed an error of law in holding that the findings of the Enquiry Officer are perverse. On the contrary, observations and findings of the Enquiry Officer are well communsurate with standard of proof required to be applied in a domestic enquiry. Various culpable omissions of the Applicants throw a light on their guilt and dishonesty mind. Accordingly, I hold that findings of the Enquiry Officer are borned out from the evidence led before him, well justifiable and are not perverse. Accordingly, I answer Point No. 3 in the negative.

100. Admittedly, Learned Labour Court has nowhere decided propriety of the punishments awarded to the Applicants, said issue is yet to be decided. Even then, surprisingly, the sugar factory has prayed for dismissal of original applications filed by the Applicants. It is needless to state that the Sugar Factory mis not entitled to such relief for the obvious reason that propriety of the punishment is yet to be decided. Consequently, the Appeals are allowed partly.

101. To conclude I pass following order.

Order

(i) All Appeals are partly allowed.

(ii) It is held that the enquiry is in accordance with the principles of natural justice and findings of the Enquiry Officer are legal and proper.

(iii) Impugned order holding that the enquiry suffers from the principles of natural justice and findings of the Enquiry Officer are baseless and perverse, is set-aside.

(iv) R. & P. be sent to Labour Court, Sangli and the parties shall appear there on 11th September 2003.

(v) A copy of this Judgment be kept in other Appeals.

(vi) Parties to bear their own costs.

C. A. JADHAV,
Member,
Industrial Court, Kolhapur.

Kolhapur,
dated the 25th August 2003.

V. D. PARDESHI,
Assistant Registrar,
Industrial Court, Kolhapur.

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